TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1928

No. [redacted]74

LILLIAN NICCHIA, PLAINTIFF IN ERROR,

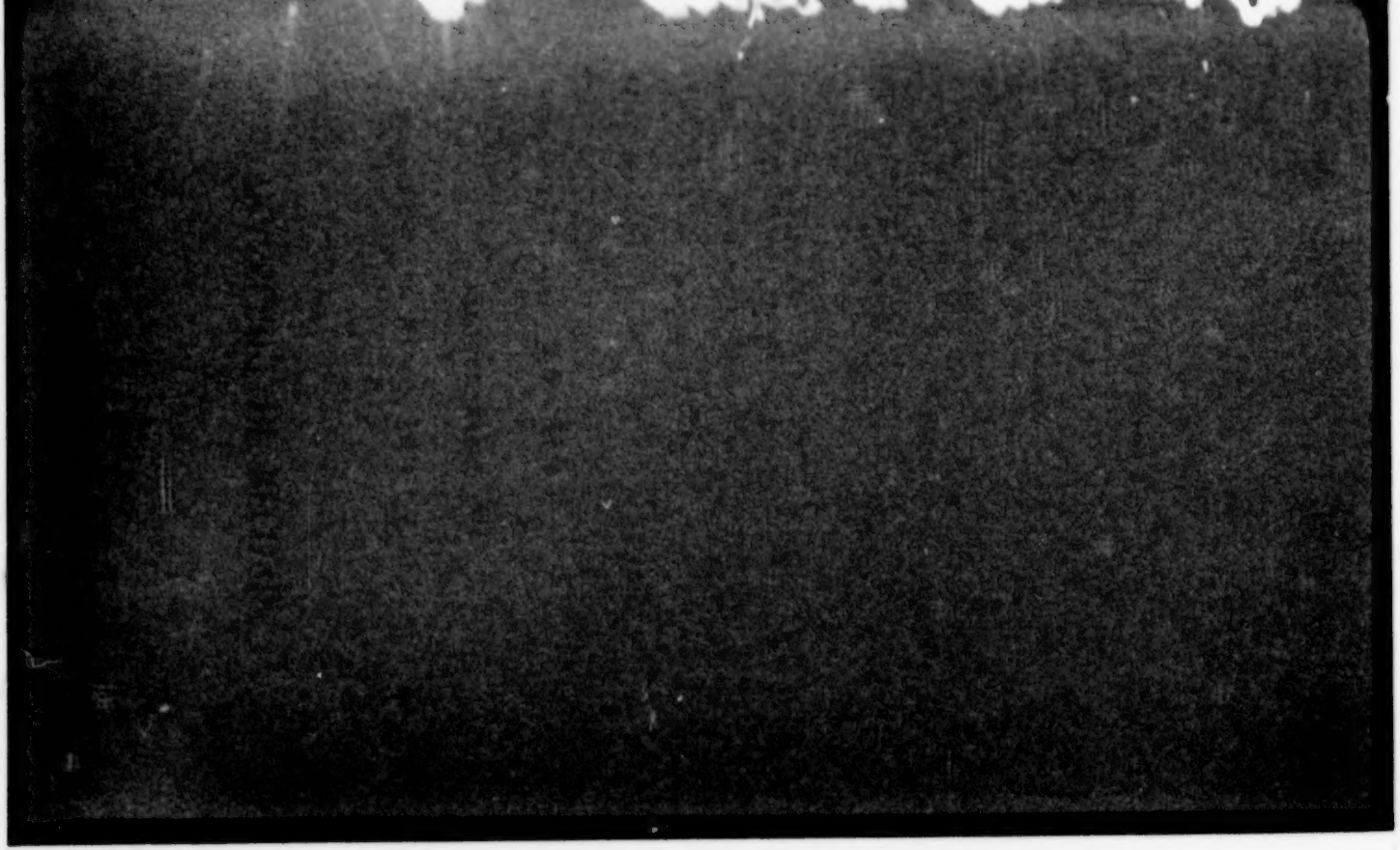
vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED MARCH 14, 1928.

(30,000)



(26,999)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 913.

LILLIAN NICCHIA, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 15, 1919.

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No. 1.

Information.

Chapter 115, Laws 1894, as Amended.

City Magistrate's Court, Brooklyn, City of New York.

STATE OF NEW YORK,
County of Kings,
City of New York, ss:

William Sturgeon, of 114 Lawrence Street, Borough of Bklyn., City of New York, being duly sworn, deposes and says, that he is a dog license inspector of the American Society for the Prevention of Cruelty to Animals; that Mary Nicchie, who resides at No. 2812 Neptune Ave., in the Borough of Bklyn., in said city, on the 11th day of October, 1916, did harbor within the corporate limits of the City of New York, two dogs for which a license has not been procured as required by Chapter 115 of the Laws of 1894, as amended.

Wherefore, complainant prays that the said party may be apprehended and dealt with according to law.

WILLIAM STURGEON.

Subscribed and sworn to before me, this 23rd day of November, 1916.

GEORGE H. FOLWELL,
City Magistrate's Court,
Brooklyn, City of New York.

6–17

No. 3.

Magistrate's Disposition.

Mary Nicchie. 4185.

Ad. for counsel to appear 9 A. M.

Nov. 23, 1916.

Defendant, by Joseph Nicchia, attorney, 256 Broadway, Manhattan, pleads not guilty.

Later counsel for defendant stipulates (and defendant acquiesces in such stipulation), that defendant has, owns and harbors 2 dogs; that she has no license for them, that she declines to obtain such licenses on the ground that the statutes and laws requiring such a license or giving the society the right to collect any money or tax for dog licenses is unconstitutional.

On the foregoing stipulation and the defendant waiving any proof of facts, I find the defendant guilty of harboring and owning a dog in the corporate limits of the city without having a license therefor.

The defendant asks immediate sentence.

The defendant is fined $10, in default 10 days in the City Prison.

GEORGE H. FOLWELL,
City Magistrate.

November 23, 1916.

Paid fine, $10, W. H. B. protest. November 23, 1916.

18 No. 2.

Testimony.

City Magistrate's Court of the City of New York, Borough of Brooklyn, 8th District.

PEOPLE, &C.,

vs.

MARY NICCHIA.

Charge: Viol. Chap. 115, Laws of 1894, Harboring an Unlicensed Dog.

Before Hon. George H. Folwell, City Magistrate.

November 23, 1916.

Appearances:

Mr. Joseph Nicchia, for defense.

The Court: The charge of harboring, keeping, maintaining a dog within the corporate limits of the city without having a license therefor.

Mr. Nicchia: We plead not guilty, first of all, and secondly——

The Court: What is your name, please?

Mr. Nicchia: Joseph Nicchia.

The Court: And the address?

Mr. Nicchia: 256 Broadway.

The Court: What do you want to say—I have entered a plea of not guilty for you?

Mr. Nicchia: Yes, sir. I move, if your Honor please, to dismiss the complaint, on the ground that the statute upon which this claim is based is unconstitutional.

19 The Court: First of all, the answer to that is this: That this is an inferior court and all presumptions of the constitutionality of the statute are decided in a court like this and in all courts, except appellate courts, in favor of the constitutionality.

will not hear an argument on the constitutionality of the statute. If you make your next point I will hear you.

Mr. Nicchia: But, if your Honor please, this has already been passed upon by the Supreme Court.

The Court: That is not for me, and you are addressing yourself to deaf ears on that.

Mr. Nicchia: Very well, then I file my answer, nevertheless.

The Court: You plead not guilty and ask for trial when?

Mr. Nicchia: Will your Honor put the trial on for Wednesday?

Mr. Grace: If your Honor please, we have been down here a number of times on this, and I think it ought to be disposed of. Evidently the learned attorney is not aware of the decision of the Supreme Court——

Mr. Nicchia: As to that, let me say this, and if your Honor will look at the records, that was a made-up case between the society and this man who caused himself to be arrested. The facts which were stated in that case are not true, and upon those facts which are not true Judge Lehman made that decision. In other words, under the facts in that case, if your Honor please, which my learned friend now states, it came after the case of Fox, in which the statute was declared unconstitutional. Under the decision of the Fox case the Courts ruled that the statutes of 1894, 1895 and 1896 were unconstitutional.

The Court: Why do you take up my time with arguing whether or not it is constitutional? In a recently decided case the statute is upheld. I cannot determine that the facts there did not justify the decision made by the Supreme Court; I will not pass on that nor render a decision that the act is unconstitutional. Is that your only point that the statute is unconstitutional? Do you admit the fact that you have a dog and you have no license?

Inspector Sturgeon: Two dogs.

Mr. Nicchia: Yes, sir. I have a decision of the Court of Appeals—will your Honor regard the decision of the Court of Appeals?

The Court: I only want to get the record straight.

Mr. Nicchia: Yes, sir.

The Court: Then you don't want a trial as to these facts; these facts you stipulate?

Mr. Nicchia: Yes, sir.

The Court: And your sole claim is?

Mr. Nicchia: That the statute is unconstitutional upon the facts which I am going to state to your Honor—not only that it is unconstitutional because it is against the Constitution of the United States as well as against the Constitution of the State of New York, but this bill in question, which is the bill of 1902, was not passed according to the Constitution in that that was an appropriation and should have been passed by two-thirds of the members elected to both branches of the House, and if it was a taxation it should have been passed by three-fifths, or if it was a renewal of a taxation, under Article 3, Section 25, it should have been passed by the approval of three-fifths of the members of the House elected to both branches, and not only that, but the ay-s and nays should have been polled and

so recorded. The bill of 1902 is nothing else but a bill which has been passed only by a majority, and so the bill says. Secondly, the bill, if it is any bill which relates to taxation or the appropriation of the people's funds, must state the nature of the bill, and so state in the caption that this bill is for taxation or to appropriate
21 certain funds for certain purposes or for taxation for certain purposes, and the bill in question does not so recite. Now, then, we have, if your Honor please, a law which they claim to have been an amendment to the laws of 1894, the laws of 1895, and the laws of 1896, which the Court of Appeals declared unconstitutional. Now, I claim, if your Honor please, that if this law was not passed according to the Constitution, why, therefore the law is unlawful, and if unlawful, those people cannot come in and impose a taxation. After this law went into effect, if your Honor please, then we have the Coler case, which I presume your Honor is well informed of that decision, and under that——

The Court: That was after the act was amended?

Mr. Nicchia: Correct; after the act was amended the Coler case came. Mr. Coler had a dog which was seized by the Society and the Society threatened to slaughter the dog, and Mr. Coler obtained an injunction and Justice Kelly, in a very learned opinion, declared that the statute was highly unconstitutional because it appropriated funds belonging to a State or to a municipality for a private corporation. That amendment did not in any way remedy the defects of the prior bills. They did not appeal, but what they did then immediately after this action which they claim now—and I want your Honor, before making a decision in that, I want your Honor to carefully look into this. I am not here to defend one dollar, because my time is worth a good deal of money, but I claim this, if your Honor please, that under those stipulated facts, which are not true, Mr. Justice Lehman made that decision, and I will show to you, if your Honor please, those facts which are untrue, and known to the attorney to be untrue.

22 The Court: I have listened to you patiently. Supposing I personally, individually felt sure that the statute was unconstitutional, and supposing I agreed with you in toto, I would still decide against you, decide the statute to be constitutional, because it is not the province of an inferior court of this kind to declare statutes unconstitutional, and moreover, the latest decision I recall is against you. It is the province of higher Appellate Courts to pass on the constitutionality of statutes, so if my personal view were that it was unconstitutional, I would still decide in favor of the constitutionality of the act and let the Appellate Courts have the say, if they thought so, that it was unconstitutional. Just listen to this and see whether this is a correct statement: The defendant, by Joseph Nicchia, an attorney of 256 Broadway, Manhattan, pleaded not guilty. Later in the course of argument, counsel for the defendant stipulated (and the defendant acquiesced in such stipulation) that the defendant has, owns and harbors two dogs, that she has no licenses for them, that she declines to obtain such licenses on the ground that the laws requiring such a license or giving the society the right to collect any

money or tax for dog licenses is unconstitutional. Upon that stipulation that she has such dogs and that she refuses to get licenses for them, I find her guilty.

Mr. Nicchia: Will your Honor then allow me a little more discussion?

The Court: No; I will not hear any discussion on the constitutionality of the act.

Mr. Nicchia: But it has been decided by Mr. Justice Kelly ——

Mr. Grace: The decision of Justice Kelly decided nothing. The dog was held by the society and he decided that it should be turned over to Mr. Coler until the decision of the Court; that is the Kelly decision.

23 Mr. Nicchia: No; the Kelly decision is quite different. "In that case, a simple statute was declared unconstitutional for various reasons, and the statute was amended for the purpose of avoiding the unconstitutional provisions commented upon by the Court. I have read with interest and great respect the opinion of former Justice Andrew, in which he holds that the act in its present form obviates the objection of the Fox case, but there remained one objection to the act in question pointed out by Justice Cullen at page 524. He says: "If it were necessary for the disposition of this case, agreeing with the view of the learned Appellate Division I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens, except that of eminent domain, to be exercised for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me." I don't believe that the legislature can pass any such power as is sought to confer here in private corporations." Now, this, if your Honor please, is the decision of a higher tribunal than the Magistrate's Court, and I was always under the impression that the Magistrates would follow the decision of the Supreme Court.

The Court: I will follow it. I am clear in my mind, without giving the chronology of the statements, that the law was amended, and that thereafter there was another decision which said that it was constitutional. I am through arguing about it. I find the defendant guilty. Are you ready for sentence now?

Mr. Nicchia: Will your Honor make such a statement——

24 The Court: I am going to concede that it may be and even will be decided I am in error in holding the statute constitutional—that I am wrong on the law. On the facts, I still find the defendant guilty, and would do so deliberately even if I felt personally that the statute was unconstitutional. Are you ready for sentence now?

Mr. Nicchia: I take an exception to your Honor's ruling.

The Court: The defendant is fined ten dollars, or in default of the payment, committed to the City Prison for ten days.

Mr. Nicchia: Now, if your Honor please, we pay the ten dollars under protest, and so it should be marked.

The Court: Now, again, I want it clear for the record that this stipulation of the facts, the possession of the dogs and the ownership of them, and the fact that there is no license and defendant's refusal to get a license, are established, and that these facts are conceded, and that your sole point is that the act is unenforceable upon the ground that in prescribing the requirements for obtaining a license and in not allowing dogs to be kept within the corporate limits of the city without a license the act is unconstitutional. That is your sole point?

Mr. Nicchia: And also that this act was not passed by two-thirds of the members elected to the legislature.

The Court: Is void and unconstitutional.

Mr. Nicchia: Now, I will make my exception on the record: That the statute is unconstitutional, first, it violates Section 9, Article 8, of the Constitution in that said law authorizes the giving of State money to a private corporation or undertaking in requiring the payment of a license fee to said society; second, violates Section 10, Article 8, of the Constitution in that said law authorizes the
25 giving of money of the City of New York to a society, a private corporation; third, violates Section 18, of Article 3, in that it grants said society exclusive privileges, immunities and franchises; fourth, violates Section 6, Article 1, and Section 1, of Article 14, of the Constitution of the United States, depriving a citizen of his liberty without due process of law, to wit: the liberty of owning and harboring a dog without procuring a license from and paying a fee therefor to the society, a private corporation; fifth, violates the Constitution of the State of New York in that said laws vest in a private association authority affecting the life, liberty and property of the citizens of the State, and invests in said society the administration of certain public duties of the State without being amenable to the State; also, constitutes the society a public officer; also, vests upon agents and officers appointed only by the society, powers belonging to public officers without being amenable to the People of the State, nor does it compel the officers of said society or give them power to enforce any infringement of the laws upon the complaint of a citizen; also, the officers and agents of said society are not appointed nor subject to removal by the State or City authorities, are not answerable for acts of misfeasance or nonfeasance, nor compelled to be citizens of the United States or the State of New York, infringing thereby the general laws relating to the appointment of public officers; sixth, violates Section 20 of Article 3, of the Constitution of the State of New York, as it appropriates public money for local or private purposes, being passed with the assent of a majority and not two-thirds of the members elected to each branch of the legislature, nor were the ayes and nos polled; seventh, violates Section 25 of Article 3, in that it imposes a tax or a renewal of a tax for
26 local purposes without the assent of three-fifths of the members elected to each branch of the legislature, nor were the ayes and nos polled; also, violates the Constitution in that said bill does not state that said act was for the imposition of a tax or for an appropriation of funds. Now we pay the fine under protest.

No. 4.

Return.

Supreme Court, Kings County.

THE PEOPLE OF THE STATE OF NEW YORK, *etc.*,

against

MARY NICCHIE.

To the Honorable County Court of Kings County:

I hereby make return on appeal in the case of The People of the State of New York against Mary Nicchia, defendant, which action was tried before me in the Eighth District City Magistrate's Court, Borough of Brooklyn, City of New York, on the 23rd day of November, 1916. Attached to the original affidavit and order allowing appeal are the complaint, etc., and transcript of stenographer's minutes.

Dated, Brooklyn, New York, December 8th, 1916.

Respectfully submitted,

GEORGE H. FOLWELL,
City Magistrate of the City of New York.

Endorsed on cover: 52456 B—Title—280. Filed December 9, 1916.

27

No. 5.

Opinion.

County Court, Kings County.

By HYLAN, *J.*:

People v. Nicchie.—This is an appeal from a judgment of conviction in a Magistrate's Court, where the defendant was charged with harboring within the corporate limits of the city two dogs for which licenses had not been procured, as required by Chapter 115 of the Laws of 1894, as amended. A fine of $10 was imposed, which the defendant paid under protest. Several acts amendatory of this statute were subsequently passed, viz., Chapter 412 of the Laws of 1895, Chapter 448 of the Laws of 1896 and Chapter 495 of the Laws of 1902, which must now be construed as having always been a part of the original act (Sweet v. City of Syracuse et al., 129 N. Y., 316-330). The defendant argues that this statute violates in many respects the state constitution, and at least in one respect the Constitution of the U. S., and cites the case of Fox v. Mohawk & H. R. Humane Society (165 N. Y., 517), and other cases as bearing out her contention, and also argues upon principle. The

general rule is that every presumption is in favor of the validity of legislative acts unless there is a substantial departure from the fundamental law. As quoted by Earl, J., in the Sweet case (supra), at page 350: "It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt." The several sections of the said statute, or the material parts thereof, so far as the same are essential to a discussion of the questions raised on this ap-
28 peal, should, I think, be briefly stated. Section 1 provides that every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over 800,000, shall procure a yearly license and pay the sum of $2 for each dog licensed. Section 2 provides licenses granted under the act must be renewed annually, prior to the expiration of the term, by the payment of $1 for each renewal. Section 5 provides that dogs not licensed pursuant to the act shall be seized, and if not claimed and redeemed * * * or destroyed * * * within five days thereafter, they shall then be destroyed. Section 8 empowers and authorizes the American Society for the Prevention of Cruelty to Animals to carry out the provisions of the act, and the society is thereby further authorized to issue the licenses and renewals and to collect the fees therefor, and the fees so collected shall be applied by the society as provided in and by said act. Section 9 provides for the punishment of any person who shall violate the provisions of the act. The grounds of the objections raised by the defendant are as follows: 1. That the statute in question violates Sections 9 and 10 of Article 8 of the state constitution, because it authorizes the giving of public money to a private corporation, viz., the American Society for the Prevention of Cruelty to Animals. 2. That it also violates Sections 18, 20 and 25 of Article 3 of the constitution (*a*) because it grants to the society an exclusive privilege, immunity or franchise; (*b*) because it appropriates public money for local or private purposes, without being passed by a two-thirds vote; (*c*) because it imposes a tax and a renewal of a tax for local or private purposes, without being passed by a three-fifths vote. 3. That it violates Section 6 of Arti-
cle 1 of the state constitution, and also Section 1 of Article 14
29 of the Constitution of the United States by depriving the citizen of his liberty without due process of law, to wit, the liberty of owning and harboring a dog without procuring a license from, or paying a fee to, the society. 4. That the statute violates the state constitution and the general laws of the state for the following reasons: (*a*) That it vests in the society authority and power affecting the life and liberty and property of citizens; (*b*) that it vests in the society certain public duties; (*c*) that the officers and employees of the society are invested with the power of public officers, must be elected by the people or appointed by competent authority; (*d*) that it does not give power to the public authorities to remove the officers and members of the society, as the only authority over them is the society. As to the objection made by the defendant first above noted that the statute in question violates Sections 9 and 10 of Article 8 of

the constitution for the reason that it authorizes the giving of public money to a private corporation or undertaking, I am of opinion that while the decision in the case of Fox v. Mohawk H. R. Humane Soc'y (supra), declared the statute to be unconstitutional in that respect, the amendment of the statute passed in 1902 cured that defect by providing that any fees collected and not required in carrying out the provisions of the act, shall be retained by the society as compensation for enforcing the provisions of title sixteen of the Penal Code (now Article 16 of the Penal Law), and such other statutes of the State as relate to the humane work in which the society is engaged. As to the objection secondly above mentioned that the statute violates Sections 18, 20 and 25 of Article 3, because of the several reasons there specified, I am of the opinion that the statute does not offend
30 against either of the sections of the fundamental law. Section 18, regarding the granting of an exclusive privilege, immunity *of* franchise was discussed in the Fox case (supra). The Court said as to this question, at page 526: "We are of further opinion that the statute, so far as it empowers the defendant to appropriate, harbor and keep dogs without paying any license fee, while every other citizen is obliged to pay such license fee, is the grant of an exclusive privilege and immunity forbidden by Section 18, Article 3 of the Constitution. * * * The defendant can keep any dog it sees fit, and is not required to pay anything for the privilege; no one else in the community can keep a dog without paying a dollar a year for the privilege, to say nothing of the fact that he is compelled to pay that dollar to the defendant. We think this is an exclusive privilege condemned by the Constitution." I hold that that part of the amendment of 1902 referred to, which commands that dogs not claimed and redeemed or destroyed within five days after the time of seizure, shall then be destroyed, fully meets the criticism of the Court in the respect mentioned, and cures the defect in the statute in that behalf, and especially so, as the statute now puts all citizens on the same footing regarding the keeping or destruction of dogs in the City of New York. The fact must not be overlooked that the decision in the Fox case was rendered fully a year prior to the enactment of the amendment of 1902. As to the objection made under Section 20, that the statute appropriates public money to a private or local purpose without being passed by a two-thirds vote, I cannot see any force in the objection. In the first place the society in question, the American Society for the Prevention of Cruelty to Animals, was organized under a special act of the State Legislature, passed April 10,
1866 (being Chapter 469 of the laws of that year), and by
31 Section 9 thereof the provisions of the act are declared to be general within the boundaries of the State, and Section 186 of the Penal Law enacts that any agent or officer of the society may cause the destruction of any abandoned or improperly cared for animals, the same as any peace officer, and by Section 8 of the Act of 1894 the society is authorized to carryout the provisions of the act and to enforce the provisions of Chapter 16 of the Penal Law, which extends to the entire State. Furthermore, this question and the question raised under Section 25 of Article 3 seem to have been

brought to the attention of the Court in the Fox case (supra) and are presumed to have been there passed upon favorable to the statute under consideration. The objection by the defendant that the statute violates Section 6 of Article 1 of the Constitution and Section 1 of Article 14 of the Constitution of the United States by depriving, as she claims, the citizen of his liberty without due process of law because the citizen cannot own or harbor a dog without procuring a license from or paying a fee to the society is clearly untenable, not only in view of what has already been said regarding the effect of the amendment of 1902 to the statute, but according to the settled facts of the case as appears by the record, and for the reason that the question of the liberty of the citizen, civil or otherwise, is in no way involved therein. In the Fox case (supra), at page 520, the Court held that the direction in the statute for the summary destruction or appropriation of the dog, without notice to the owner, was not a taking of the property of such owner without due process of law, and, as a reason, the Court there stated "that under any circumstances there is but a qualified property in dogs, cats and similar animals, and in fact there may be said to be no property in them as against the police power of the State." So that the right to own or har-
32 bor a dog depends upon a compliance with certain regulations under the statute. As against a wrongdoer, however, it is a different question. The life of the dog has always been subject to the will of the Legislature and to the right of any citizen to take it until the passage of the statutes to prevent cruelty to animals, and since the state recognizes no property right of the citizen in the dog, as against the police power of the State, there is no infringement upon the rights of the citizen under the constitutional provision cited because of the enactment of the statute in question (Sentell v. New Orleans & C. R. R., 166 U. S., 698). As to the objection that the statute vests in the society authority and power affecting the life, liberty and property of the citizen, I hold to the view that it is too plain for argument, that it does not vest authority and power in the society affecting the life of the citizen, and, so far as the question of property is concerned, it vests no such power or authority in the society. My views as to this point are based upon a decision in the Fox case, where the Court held that dogs are not property, as between the state and its citizens, as already herein observed. So far as the question of liberty is concerned, I have already considered that question. The objection that the statute vests in the society certain public duties, and that the officers and employees of the society are therefore invested with the powers of public officers and that no power is given to the public authorities over the officers and employees, I hold that the decision in the Fox case quiets all such questions, for the Court there decided that the statute in question could not be held void upon the ground that it assumes to vest in a private corporation the execution of certain police powers of the state and in effect to constitute it a public officer.

The objection that the Legislature delegated legislative
33–37 power to the society is untenable (Matter of N. Y. El. R. R. Co., 70 N. Y., 327-343), and so is the objection that the

magistrate erred in not allowing the defendant to put in proof to show that the statute is invalid. If a statute cannot be made to appear unconstitutional by argument deducted from the language of the act itself, or from matter — which the Court can take judicial notice, it must stand (People v. Durston, 119 N. Y., 569). I have reached the conclusion that the statute assailed is valid. The judgment of conviction is therefore affirmed.

38–39

No. 6.

Opinion.

363 E.

THE PEOPLE OF THE STATE OF NEW YORK, Respondents,

v.

MARY NICCHIE or LILLIAN NICCHIA, Appellant.

Judgment of the County Court of Kings County, affirming judgment of conviction of the Magistrate's Court, affirmed upon authority of People ex rel. Westbay v. Delaney (146 App. Div. 957), affirming an order dismissing a writ of habeas corpus. The Court is also of opinion that the statute in question (Chapter 115, Laws of 1894, as amended by Chapter 112, Laws of 1895, and Chapter 495, Laws of 1902) is valid within decision in Fox v. Mohawk & Hudson River Humane Society (165 N. Y. 517) and that it avoids the defects of the statute involved in that case as pointed out by the Court of Appeals.

Jenks, P. J., Thomas, Mills and Rich, JJ. concur.

40

No. 7.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Held in and for the Second Judicial Department, in the Borough of Brooklyn of the City of New York, on the 20th March, 1918.

Present: Honorable Almet F. Jenks, Presiding.
" Edward B. Thomas.
" Isaac N. Mills.
" Adelbert P. Rich.
" Harrington Putnam.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MARY NICCHI or LILLIAN NICCHI, Appellant.

Order for Leave to Appeal to Court of Appeals.

The judgment of conviction against the defendant having been affirmed by this Court, and thereon the defendant-appellant moving the Court for leave to appeal to the Court of Appeals; On the affidavit of defendant's attorney, verified 16th February, 1918, and notice of such motion with proof of due service thereof on the District Attorney, for the People, complainant, and also on counsel for the American Society for the Prevention of Cruelty to Animals, on the record herein; and Harry E. Lewis, Esq., District Attorney for Kings County, appearing for the People; and after hearing Mr. Joseph Nicchia, of counsel for defendant-appellant, for the motion; and Mr.

Harry G. Anderson, Assistant District Attorney, of counsel
41 for the People, respondent, and Mr. William N. Dykman, of counsel for the American Society for the Prevention of Cruelty to Animals, opposed;

And it appearing to the Court that questions of law are involved in this action which ought to be reviewed by the Court of Appeals.

Now on motion of Joseph Nicchia, Esq., attorney for the defendant-appellant, it is

Ordered that said motion of defendant-appellant for leave to appeal to the Court of Appeals be and the same hereby is allowed, and this Court hereby certifies that questions of law are involved herein which ought to be reviewed by the Court of Appeals.

Enter,

ALMET F. JENKS,
Presiding Justice.

Endorsed: Filed March 20, 1918, on decision of March 1st, 1918."

42 No. 8.

Court of Appeals.

STATE OF NEW YORK, *ss.:*

Pleas in the Court of Appeals, Held at Court of Appeals Hall, in the City of Albany, on the 29th day of October, in the Year of our Lord One Thousand Nine Hundred and Eighteen, before the Judges of said Court.

Witness the Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur Oct. 30, 1918.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

MARY NICCHIE or LILLIAN NICCHIA, Appellant.

Be it remembered, That on the 25th day of April in the year of our Lord one thousand nine hundred and eighteen Mary Nicchie or Lillian Nicchia the appellant in this action, came here into the Court of Appeals, by Joseph Nicchia her attorney, and filed in the said Court a Notice of Appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court, affirming the judgment of the County Court of Kings County which affirmed the judgment of conviction of the Magistrate's Court, 8th District, Borough of Brooklyn, which return was afterwards amended. And The People of the State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Harry E. Lewis, District Attorney.

43 Which said Notice of Appeal and the return thereto, filed and amended as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joseph Nicchia of counsel for the appellant, and by Mr. William N. Dykman, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment appeal- from in this action, be and is hereby in all things affirmed.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said County Court of Kings County.

Therefore, it is considered that the said original judgment of conviction be and is hereby in all things affirmed as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the County Court of Kings County before the Judges thereof, according to the form of the statute in such case made and provided.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals, Clerk's Office.

Albany, Oct 30, 1918.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER, *Clerk.*

44 [Endorsed.]

SIR: Please take notice that the within is a copy of an order this day duly entered and filed in the office of the Clerk of Court of Appeals, Albany, N. Y.

Dated, Oct. 30, 1918.

Yours, etc.,

HARRY E. LEWIS,
District Attorney, Kings County.

Attorney for Plaintiffs, No. 66 Court Street, Brooklyn, New York City.

To Joseph Nicchia, Esq., Attorney for Defendant.

#8, Court of Appeals, State of New York. The People of the State of New York, Plaintiffs Respondents, against Mary Nicchie or Lillian Nicchia, Defendant, Appellant. (Copy) Remittitur. Harry E. Lewis, District Attorney, Kings County, Attorney for Plaintiffs, No. 66 Court Street, Brooklyn, New York City. Due and timely service of a copy of the within is hereby admitted. Nov. 8, 1918. To Joseph Nicchia, Esq., Attorney for Defendant-Appellant, 256 Broadway, New York City.

45 No. 9.

At a Term, Part V, of the County Court of Kings County, Held in the Court-house Thereof, in the Borough of Brooklyn, City of New York, on the 6th Day of November, 1918.

Present: Honorable Norman S. Dike, County Judge.

THE PEOPLE OF THE STATE OF NEW YORK, Plaintiffs,

against

MARY NICCHIE or LILLIAN NICCHIA, Defendant.

A judgment having been duly rendered on the 23rd day of November, 1916, in the City Magistrate's Court of the City of New York, Borough of Brooklyn, Eighth District, convicting the defendant of violating chapter 115 of the Laws of 1894, as amended, in that she did harbor two dogs for which a license had not been procured, and sentencing her to pay a fine of Ten Dollars, or in default thereof to be imprisoned for a term of ten days, and the said defendant having thereafter appealed to the County Court of Kings County from the judgment of conviction as aforesaid, and the said appeal having come on and been heard, and the judgment of conviction of the City Magistrate's Court having been affirmed on February 6, 1917, by Honorable John F. Hylan, then a county judge of Kings County, and the said defendant having thereafter and on the 21st day of February, 1917, appealed from the judgment and order

of the County Court to the Appellate Division of the Supreme Court, Second Department, and the said Appellate Division having
46 thereafter and on January 18, 1918, affirmed the judgment and order of the County Court as aforesaid, and the said Appellate Division of the Supreme Court having on the 28th day of March, 1918, granted leave to the defendant to appeal to the Court of Appeals from the judgment and order of the Appellate Division as aforesaid, and the said appeal having duly come on to be heard in the said Court of Appeals and the said Court of Appeals having, after due deliberation, on the 29th day of October, 1918, affirmed the judgment of the Appellate Division of the Supreme Court which affirmed the judgment of the County Court of Kings County which affirmed the judgment of conviction of the City Magistrate's Court of the City of New York of the Borough of Brooklyn, Eighth District, as appears by the remittitur dated October 30, 1918.

Now, on reading and filing a certified copy of the said remittitur, and on motion of Harry E. Lewis, District Attorney of Kings County, it is

Ordered that the said judgment and order of the Court of Appeals be and the same hereby are made the judgment and order of this court.

Enter.

NORMAN S. DIKE,
County Judge.

Granted Nov. 6, 1918.
WILLIAM E. KELLY, *Clerk.*

47

[Endorsed.]

SIR: Please take notice that the within is a copy of an order this day duly entered and filed in the office of the Clerk of Kings County.
Dated, November 6th, 1918.
Yours, etc.,

HARRY E. LEWIS,
District Attorney, Kings County.

Attorney for Plaintiffs, No. 66 Court Street, Brooklyn, New York City.

To Joseph Nicchia, Esq., Attorney for Defendant, 256 Broadway, Manhattan.

#9. County Court, County of Kings. The People of the State of New York, Plaintiffs, against Mary Nicchie, or Lillian Nicchia, Defendant. (Copy) Order on Remittitur. Harry E. Lewis, District Attorney, Kings County, Attorney for Plaintiffs, No. 66 Court Street, Brooklyn, New York City. Due and timely service of a copy of the within is hereby admitted. November 8, 1918. To Joseph Nicchia, Esq., Attorney for Defendant, 256 Broadway, Manhattan.

48 No. 10.

In the Court of Appeals of the State of New York.

Ex Parte LILLIAN NICCHIA, Petitioner.

Petition for Writ of Error, Requiring the County Court of Kings County, State of New York, to Certify to the Supreme Court of the United States for Its Review and Determination the Case of the People of the State of New York Against Mary Nicchie or Lillian Nicchia.

The petition of Lillian Nicchia, the above named defendant, respectfully shows to this Honorable Court as follows:

I. That your petitioner is a citizen of the United States, and resides at 2812 Neptune Avenue, in the Borough of Brooklyn, City and State of New York.

II. That on November 16, 1916, before the Magistrate's Court of the City of New York, Borough of Brooklyn, Eighth District, upon the complaint of one William Sturgeon, a dog license inspector of the American Society for the prevention of cruelty to animals, petitioner appeared to answer the criminal charge of harboring within the corporate limits of the City of New York, two dogs for which a license had not been procured as required by Chapter 115 of the Laws of 1894, as amended.

III. That the act in question, to wit, Chapter 115 of the Laws of 1894 as amended by Chapter 412 of the Laws of 1895, and Chapter 495 of the Laws of 1902, is as follows:

"The People of the State of New York represented in Senate and Assembly, do enact as follows:

"Section 1. Every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over eight hundred thousand shall procure a yearly license and pay the sum of two dollars for each dog, as hereinafter provided; and in applying for such license the owner shall state in writing the name, sex, breed, age color and markings of the dog, for which the license is to be procured. (As amended by Laws 1895, Chap. 412.)

49 "Sec. 2. Licenses granted under this act shall date from the first day of May in each year, and must be renewed prior to the expiration of the term by the payment of one dollar for each renewal. (As amended by Laws 1895, Ch. 412.)

"Sec. 3. Each certificate of license or renewal shall state the name and address of the dog, and also the number of such license or renewal. (As amended by Laws 1895, Ch. 412.)

"Sec. 4. Every dog so licensed shall, at all times, have a collar about its neck, with a metal tag attached thereto, bearing the number of the license. Such tag shall be supplied to the owner with the certificate of license and shall be of such form and design as the society empowered to carry out the provisions of this act shall designate, and duplicate tags may be issued only on proof of loss of the

original and payment of the sum of one dollar therefor. (As amended by Laws 1895, Ch. 412.)

"Sec. 5. Dogs not licensed pursuant to the provisions of this act shall be seized, and if not claimed and redeemed within forty-eight hours thereafter, they may be destroyed but if not claimed and redeemed or destroyed within five days of the time of seizure, they shall then be destroyed. (As amended by Laws 1902, Ch. 495.)

"Sec. 6. It is further provided that any cat found within the corporate limits of any such city without a collar about its neck bearing the name and residence of the owner stamped thereon, may be seized and disposed of in like manner as prescribed above for dogs. (As amended by Laws 1895, Ch. 412.)

"Sec. 7. Any person claiming a dog or cat seized under the provisions of this act, and proving ownership thereof, shall be entitled to resume possession of the animal on payment of the sum of three dollars, provided, however, that such claim shall be made before the expiration of forty-eight hours as provided in section five. (As amended by Laws 1895, Ch. 412.)

"Sec. 8. The American Society for the prevention of cruelty to animals is hereby empowered and authorized to carry out the provisions of this act, and said society is further authorized to issue the licenses and renewals, and to collect the fees therefor, as hereinafter prescribed, and the fees so collected shall be applied by said society in defraying the cost of carrying out the provisions of this act and maintaining a shelter for lost, strayed or homeless animals; and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the State as relate to the humane work in which the said society is engaged. (As amended by Laws 1902, Ch. 495.)

"Sec. 9. Any person or persons, who shall hinder or molest or interfere with any officer or agent of said society in the performance of any duty enjoined by this act, or who shall use a license tag on a dog for which it was not issued, shall be deemed guilty of a misdemeanor. Any person who owns or harbors a dog, without complying with the provisions of this act shall be deemed guilty of disorderly conduct, and upon conviction thereof, before any magistrate shall be fined for such offense any sum not exceeding ten dollars, and in default of payment of such fine may be committed to prison by such magistrate until the same be paid, but such imprisonment shall not exceed ten days. (As amended by Laws 1895, Ch. 412.)

"Sec. 10. None of the provisions of this act shall apply to dogs owned by non-residents passing through the city, nor to dogs brought to the city and entered for exhibition at any dog show. (As amended by Laws 1895, Ch. 412.)

"Sec. 11. The thirteenth subdivision of section eighty-six, of chapter four hundred and ten of the laws of eighteen hundred and eighty-two, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the City of New York,' and all other acts and parts of acts inconsistent with the pro-

visions of this act are hereby repealed. (As amended by Laws 1895, Ch. 412.)

"Sec. 12. This act shall take effect immediately. (As amended by Laws 1895, Ch. 412.)"

IV. That the American society "for the prevention of cruelty to animals" was incorporated by chapter 469 of the Laws of the State of New York, passed April 10, 1866, and such is declared to be its purposes, (section 1); and its by-laws which its charter authorized (section 5), declare its object to be "to provide effective means for the prevention of cruelty to animals; to enforce all laws which are now or may hereinafter be enacted for the protection of animals" etc.

V. The said American society for the prevention of cruelty to animals is a private corporation; its officers are not elected by the people or appointed by any State or City authority; and under the provisions of Chapter 115 of Laws 1894, and its amendments, the said
51 society collects the so-called license fees from owners of dogs and such fees the society retains without rendering any account thereof to any public office or authority.

VI. In substance the statute in question, under which license fees are collected by the said society, requires the payment of such license fees for dogs to this society, and makes the non-payment thereof a misdemeanor, namely, disorderly conduct, and subjects the alleged offender to a fine for such offense in a sum "not exceeding $10 and in default of payment of such fine (she) may be committed to prison by such magistrate until the sum be paid, but such imprisonment shall not exceed 10 days."

VII. Said society under its charter was to receive fifty per cent of all fines and penalties collected through its prosecutions; at the present time, however, it receives all fines collected whether collected directly through its prosecutions or otherwise. The Penal Law of the State of New York (section 196) provides as follows:

"Sec. 196. To Whom Fines and Penalties are to be Paid.

* * *

All fines, penalties or forfeitures imposed or collected for a violation of the provisions of this article, or of any act for the prevention of cruelty to animals, now in force or hereinafter passed, must be paid on demand to the American society for the prevention of cruelty to animals; except where the prosecution shall be instituted or conducted by a society for the prevention of cruelty to animals duly incorporated under the general laws of this state, in which case such fine, penalty or forfeiture must be paid on demand to such society.
* * *"

VIII. That on November 23, 1916, petitioner, upon her admission that she was the owner of two dogs and that she had not paid a license fee to said society, was found guilty and fined $10 or 10 days, which amount was paid under protest, and an appeal taken therefrom said judgment of conviction by permission, to the County Court of Kings County, where said conviction was affirmed on February

7, 1917. That thereupon an appeal was taken to the Ap-
52 pellate Division of the Supreme Court of the State of New York, Second Judicial Department, and said conviction was affirmed on January 18, 1918. That by permission of the said Appellate Division of the Supreme Court, Second Judicial Department, an appeal was duly taken to the Court of Appeals of the State of New York, which is the highest Court of Law or Equity of said state, where said judgment of conviction was on October 30, 1918 affirmed, without opinion, and all the papers relating to the case were on November 6, 1918, duly remitted to the County Court of the County of Kings, State of New York, where the same were on said date duly filed and are now on file, and the judgment of the Court of Appeals was made the judgment of said County Court. The grounds on which these appeals have been taken by petitioner is the claim that Chap. 115 of Laws 1894 and the amendments thereto are void, not only because they infringe the constitutional rights of your petitioner, under the Constitution of the State of New York, but void also because they are violative of the Fourteenth Amendment of Section 1 of the Constitution of the United States; which provides that "° ° ° no state shall make or enforce any law ° ° ° which shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws" ° ° ° which issues were raised in the court below and are contained in the record herein.

IX. That your petitioner is advised by counsel and verily believes that this is a case provided for by section 709 of the revised statutes of the United States in which the validity of a state statute is drawn into question as being repugnant to the Constitution of the United States and to the rights guaranteed thereunder to citizens of the several states and where the decision of the highest state court has been rendered in favor of said statute. The petitioner
53 further shows that it will not only be of great importance to her to have the constitutional question involved in this case submitted for decision to the highest court in the land, but that a final decision in the matter will settle the doubts now existing in the minds of the people of the State at large who are affected by the action of this law.

Wherefore your petitioner prays that a writ of error may issue from this court, directed to the County Court of Kings County, State of New York, to which Court this case has been remitted by the Court of Appeals of the State of New York, requiring said County Court of Kings County, State of New York, to certify the said record to the Supreme Court of the United States, to the end that said case may be reviewed and determined by said court as provided by the Revised Statutes of the United States, and that said Chap. 115 of Laws 1894 and its amendments may be declared unconstitutional and that the judgment of conviction heretofore rendered against your petitioner under said law, may be reversed, and

for such further relief as to said Honorable Court may *deem* just.
And your petitioner will ever pray.

LILLIAN NICCHIA, *Petitioner.*

JOSEPH NICCHIA,
GEORGE P. FOULK,
Attorneys for Petitioner,
256 Broadway, New York City.

54 State of New York,
County of Kings, ss:

Lillian Nicchia, being duly sworn, deposes and says:
That she is the Petitioner herein, that she has read the foregoing petition and knows the contents thereof and that the same is true to her own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters she believes the same to be true.

LILLIAN NICCHIA.

Sworn to before me this 24 day of January, 1919.

WILLIAM H. WACK,
Notary Public.

New York County No. 1.
New York Register No. 9016.
Comm. expires Mar. 30, 1919.

55 [Endorsed:] No. 10. In the Court of Appeals of the State of New York. Lillian Nicchia, Plaintiff in error, against The People of the State of New York, Defendants in error. Petition for Writ. Joseph Nicchia and George P. Foulk, Attorneys for plaintiff in error, 256 Broadway, New York City. Read on Application Feb. 3, 1919. Frank H. Hiscock, Chief Judge.

56 No. 11.

Court of Appeals of the State of New York.

(Remitted to the County Court of Kings County and State of New York.)

LILLIAN NICCHIA, Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

And now comes the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of the State of New York, duly remitted to the County Court of Kings County, State of New York, and made the judgment and order of said County Court, in the above entitled matter there is manifest error in this, to wit:

First. That the court erred in holding that Chapter 115 of the Laws of 1894 of the State of New York, as amended by Chapter 412 of the Laws of 1895 and Chapter 495 of the Laws of 1902, providing for the collection of moneys from the owners of dogs by The American Society for the Prevention of Cruelty to Animals, a private corporation, did not deprive plaintiff in error and other citizens of the United States and of the state of New York of property without due process of law in violation of Article XIV section 1 of the Constitution of the United States.

Second. The court erred in holding that said law of the state of New York, as amended, making the failure of the plaintiff in error to pay moneys for harboring dogs belonging to her, to The American Society for the Prevention of Cruelty to Animals, a private corporation, and obtaining a license from said society, a crime, to wit: disorderly conduct, for which she is deprived of her liberty, did not deprive her of her liberty without due process of law in violation of Article XIV section 1 of the Constitution of the United States.

Third. That the court erred in holding that said law of the State of New York as amended, which provides that the non-payment by plaintiff in error of moneys, called license fees, to The American Society for the Prevention of Cruelty to Animals, a private corporation, for harboring dogs belonging to her and for which imprisonment is ordered and adjudged, did not deprive her of liberty without due process of law in violation of Article XIV section 1 of the Constitution of the United States.

Fourth. That the court erred in holding that said law of the state of New York, as amended, providing for the payment of moneys by the plaintiff in error herein to the American Society for the Prevention of Cruelty to Animals, a private corporation, for harboring dogs, and the retention of such moneys by said private corporation, for the purpose of enforcing the law for the protection of all animals, did not deny to the plaintiff in error and other citizens of the United States the equal protection of the law in violation of Article XIV section 1 of the Constitution of the United States.

Dated, January 17th, 1919.

JOSEPH NICCHIA,
Attorney for Plaintiff in Error.

[Endorsed:] #11. Assignment of Errors. Read on application Feb. 3, 1919. Frank H. Hiscock, Chief Judge.

59 #12.

Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,

against

LILLIAN NICCHIA, Appellant.

The above entitled matter coming on upon the petition of the appellant this 3 day of Feby., 1919, against The People of the State of New York, Respondent, for a writ of error from the Supreme Court of the United States to the County Court of Kings County and State of New York, to which Court the judgment and order of the Court of Appeals of the State of New York was duly remitted according to the form of the statute in such case made and provided and made the judgment and order of said County Court on the 6th day of November 1918; and upon examination of said petition and the record in said mattter, and desiring to give the petitioner Lillian Nicchia, an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter:

It is Ordered, That a writ of error be, and is hereby, allowed to be sent from the Supreme Court of the United States to the County Court of Kings County, New York, to which court the judgment and order of this court was remitted according to law, upon the Appellant giving a bond in the sum of Three hundred dollars.

FRANK H. HISCOCK,
Chief Judge Court of Appeals.

60 [Endorsed:] #12. Order Allowing Writ.

61 No. 13.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable Judges of the County Court of Kings County, State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Court of Appeals of the State of New York, being the highest court of law or equity in which a decision could be had in the said action between the People of the State of New York, plaintiffs against Mary Nicchia or Lillian Nicchia, defendant, duly remitted by said Court of Appeals to the said County Court of Kings County, State of New York, and made a judgment of said County Court aforesaid, wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution

or laws of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of said Constitution; it is alleged that error hath happened to the great damage of the said Mary Nicchia or Lillian Nicchia, as by her petition appears.

And being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs
62–63 of the United State,s should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States the 4th day of February in the year of our Lord, one thousand nine hundred and nineteen.

[SEAL.] PERCY G. B. GILKES,
Clerk of the District Court of the United States for Eastern District of New York.

Allowed by:

FRANK H. HISCOCK,
Chief Judge Court of Appeals of the State of New York.

64

No. 14.

UNITED STATES OF AMERICA, *ss:*

To the People of the State of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New York, county of Kings, (said clerk being also the clerk of the County Court of Kings County, New York) wherein Lillian Nicchia is plaintiff in error and The People of the State of New York are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, at Albany, New York, this third day of Feb'y in the year of our Lord one thousand nine hundred and nineteen.

FRANK H. HISCOCK,
Chief Judge Court of Appeals, State of New York.

Service of Writ and within Citation is hereby admitted. Dated February 4th 1919.

HARRY E. LEWIS,
District Attorney.

65 [Endorsed:] United States Supreme Court. Lillian Nicchia, Plaintiff in Error, vs. The People of the State of New York, Defendant in Error. Citation. Joseph Nicchia, George P. Foulk, Attorneys for Plaintiff in Error, 256 Broadway, New York City, N. Y.

66–67 No. 15.

Know all men by these presents, That we, Lillian Nicchia of 2812 Neptune Avenue, in the Borough of Brooklyn, City and State of New York, as Principal, and the Fidelity and Casualty Company of New York, a corporation organized under the laws of the State of New York, having its principal place of business at No. 92 Liberty Street, City and State of New York, as Surety, are held and firmly bound unto the people of the State of New York, in the full and just sum of Three Hundred Dollars ($300.), to be paid to the said the people of the State of New York, their successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 31st day of January, 1919.

Whereas, lately at a County Court of Kings County of the State of New York in a suit depending in said Court, between the people of the State of New York, Plaintiff, and Lillian Nicchia Defendant, a judgment on remittitur from the Court of Appeals was rendered against the said Defendant affirming her conviction of the crime of disorderly conduct and the said Lillian Nicchia having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the said judgment in the aforesaid suit, and a citation directed to the said Judges of the County Court of Kings County, State of New York citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date thereof.

Now, the condition of the above obligation is such, That if the said Lillian Nicchia, Plaintiff in error shall prosecute her said writ to effect, and answer all damages and costs if she fail to make plea good, then the above obligation to be void; else to remain in full force and virtue.

LILLIAN NICCHIA.
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.
By LOUIS B. CAZIARC, *Attorney.*

Sealed and delivered in the presence of
JOSEPH NICCHIA.
K. F. STAPLETON.

#666,019.

Endorsed.

I approve the bond attached and the sufficiency of the surety.

FRANK H. HISCOCK,
Chief Judge.

Dated Feb. 3, 1919.

68 I, William E. Kelly, County Clerk of Kings County, and Clerk of the County Court of Kings County, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, prepared and made by me, in accordance with the Præcipe filed in the case entitled The People of the State of New York, Respondents, against Mary Nicchie, otherwise Lillian Nicchia, defendant, as the same appears from the original records and files thereof now remaining in my custody and control.

In witness whereof, I have hereunto set my hand and affixed the seal of this Court in my office in the City of New York, Borough of Brooklyn, Kings County and State of New York, this 3rd day of March, 1919.

WILLIAM E. KELLY, *Clerk.*

STATE OF NEW YORK,
County of Kings, ss:

I, William E. Kelly, Clerk of the County of Kings and Clerk of the Supreme Court of the State of New York in and for said County, (said Court being a Court of Record) do hereby certify that I have compared the annexed with the original Records as Stipulated filed in my office and that the same is a true transcript thereof and of the whole of such original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 3rd day of March, 1919.

[Seal Kings County.]

WILLIAM E. KELLY, *Clerk.*

E. L. R.
A. L.

69 *Praecipe Designating Parts of Record to be Included in Transcript on Writ of Error to the Supreme Court of the United States.*

In the Supreme Court of the United States.

LILLIAN NICCHIA, Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK, Defendant in Error.

To the Clerk of the County Court of Kings County, State of New York:

You are hereby requested to take a transcript of record to be filed in the Supreme Court of the United States, pursuant to a Writ of Error allowed in the above mentioned cause, and to include in such transcript of record, the following and no other papers, to wit:

1. Information in Magistrate's Court.
2. Testimony taken on trial.
3. Magistrate's disposition.
4. Return to County Court.
5. Opinion of Hylan J.
6. Opinion of Appellate Division.
7. Order granting leave to appeal to Court of Appeals.
8. Remittitur from Court of Appeals.
9. Judgment of County Court on Remittitur from Court of Appeals.
10. Petition for Writ of Error.
11. Assignment of Errors.
12. Order for Writ of Error.
13. Writ of Error.
14. Citation.
15. Bond for Costs (Omit verification).

I approve of the bond attached and the sufficiency of the surety.

FRANK H. HISCOCK,
Chief Judge.

Dated February 3, 1919.

Respectfully,

JOSEPH NICCHIA AND
GEORGE P. FOULK,
Attorneys for Plaintiff in Error.
256 Broadway, Mhtn. Boro., N. Y. C.

I hereby consent that the papers receited in the foregoing Praecipe which were served on me and which were filed on the 18th day of February, 1919, are the papers to be returned to the Supreme Court of the United States herein.

Dated, February 21, 1919.

HARRY E. LEWIS,
Attorney for Defendant in Error.

[Endorsed] *pv* Praecipe.

Endorsed on cover: File No. 26,999. New York, Kings County, Gen'l Sess. Court. Term No. 913. Lillian Nicchia, plaintiff in error, vs. The People of the State of New York. Filed March 13th, 1919. File No. 26,999.

No. 74

Supreme Court of the United States

LILLIAN NICCHIA,
Plaintiff-in-Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

JOSEPH NICCHIA,
GEORGE P. FOULK,
Counsel for Plaintiff-in-Error.

The Hecla Press, 57 Warren St., N. Y. Tel. Barclay 6290.

INDEX.

TABLE OF CASES CITED.

Supreme Court of the United States

LILLIAN NEUTHA,
Plaintiff-in-Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement of Facts.

The plaintiff-in-error was convicted of the crime of disorderly conduct in the Magistrates' Court of the City of New York, Borough of Brooklyn (fols. 18-24), for keeping certain dogs without paying a license fee to the American Society for the Prevention of Cruelty to Animals. This fee amounts to two dollars ($2) per annum for each dog owned or harbored (fol. 48).

The criminal proceedings against plaintiff-in-error were instituted by the Society's agent. Objection was made in the Magistrates' Court to the prosecution of the plaintiff-in-error upon the ground, among others, that the act in the State of New York under which the proceedings were instituted was in violation to the Constitution of the

United States (fol. 25). She was, however, convicted and appealed from the judgment of conviction to the County Court of Kings County, where the same objections were made, namely, that the act was in violation of the Constitution of the United States (fol. 27). The same objections were made in the Appellate Division of the Supreme Court, to which the plaintiff-in-error appealed. The same objections were taken, as contained in the record in the Magistrates' Court, in the Court of Appeals. The latter Court, however, affirmed the conviction, without opinion.

From the inception of the prosecution against the plaintiff-in-error she has contended that the act of the Legislature of the State of New York was in confliction with the Constitution of the United States (fol. 52), Article XIV, which provides that no State shall deprive any person of life, liberty or property without due process of law.

In the bill of exceptions duly filed herein, the specific objection is made, following the objection contained in the record when the case was first tried, that the act under which the plaintiff was prosecuted, and which provides for the collection of license fees by a private corporation, deprived plaintiff-in-error of her liberty and of her property without due process of law, in contravention of the provisions of the Constitution of the United States.

The Chief Judge of the Court of Appeals (said Court being the highest court of record of the State of New York) has allowed the writ of error herein. This writ is directed to the County Court of Kings County, to which Court the order and judgment of the Court of Appeals were duly remitted according to law for enforcement.

The Statute Under Which the Plaintiff-in-Error Was Convicted Analyzed.

The statute under which the proceeding was instituted against the plaintiff-in-error is Chapter 115 of the Laws of 1894 of the State of New York, as amended by Chapter 412 of the Laws of 1895, and Chapter 495 of the Laws of 1902.

The statute requires every person who owns or harbors a dog in the City of New York to procure a yearly license and pay two dollars ($2) for each dog. This license is for one year, and must be renewed before the expiration of the term by the payment of one dollar ($1) for each renewal. Dogs not licensed under the statute are to be seized and destroyed, if not claimed and redeemed in a specified time.

The statute in question provides that the American Society for the Prevention of Cruelty to Animals is empowered and authorized to carry out the provisions of the act, and to issue licenses and renewals *and collect the fees therefor.* The fees are to be applied by the Society in defraying the costs in carrying out the provisions of the act, and maintaining a shelter for lost, strayed or homeless animals, and fees collected and not required in carrying out the provisions of the act shall be retained by the Society as compensation for enforcing certain provisions of law, for the humane work in which the Society is engaged.

The statute further provides that any person who owns or harbors a dog without paying money to this Society and complying with the provisions of the act, shall be deemed guilty of disorderly conduct, and upon conviction thereof shall be fined for such offense not exceeding ten dollars ($10), and in de-

fault of payment may be committed to prison until the fine is paid. The imprisonment, however, shall not exceed ten days.

This legislation affects well nigh half a million owners of dogs in the City of New York, and objection has been made on the part of many citizens to the payment of such fees to this private society.

The Status of the American Society.

The American Society for the Prevention of Cruelty to Animals is a private corporation; its officers are not elected by the people nor appointed by any State or City authority. This private society collects the license fees in question from owners of dogs, and these fees, amounting to several hundred thousand dollars a year, it retains, without rendering any account thereof to any public office or authority (fols. 50, 21).

The Society was organized "for the prevention of cruelty to animals," and its by-laws declare its object to be "to provide effective means for the prevention of cruelty to animals, to enforce all laws which are now or may hereinafter be enacted for the protection of animals," etc. (fol. 50).

It formerly received, in addition to the license fees above mentioned, 50 per cent of all fines and penalties collected through its prosecutions. This law was later amended, granting it the right to receive all fines collected directly through its prosecutions or otherwise (fol. 51).

The questions now presented to the Court arise out of the due process of law provision and are:

First: Is the property of the plaintiff-in-error taken?

Second: Has not the plaintiff been declared guilty of the crime of disorderly conduct and fined and imprisoned for non-payment of money to this Society without due process of law?

Third: Does not the statute in question take the money of the plaintiff-in-error and appropriate it to a private corporation?

The statute under which the defendant-in-error collected license fees from owners of dogs in the City of New York was similar to that under which the Mohawk Human Society (another private corporation in the upper part of the State) also collected license fees from owners of dogs. Mr. Fox brought suit to contest the validity of collecting these fees by said society, and his action was successful in the Appellate Division of the Supreme Court and in the Court of Appeals (165 N. Y.).

After this decision the American Society (the defendant-in-error) about the year 1902 had the statute under which it collected fees amended with a view to obviating the constitutional objections in the Fox case.

The two statutes are given in parallel columns below:

ACT OF 1896. (Ch. 448.) (*Fox case.*)	ACT OF 1894. Amendment of 1902. (Ch. 495.) (*Case at Bar.*)
Sec. 5. Dogs not licensed pursuant to the provisions of this act shall be seized and if not redeemed within forty-eight hours may be destroyed or otherwise dis-	Sec. 5. Dogs not licensed pursuant to the provisions of this act shall be seized, and if not claimed and redeemed within forty-eight hours thereafter, they may

posed of at the discretion of the Society empowered and authorized to carry out the provision of this act.

Sec. 7. The incorporated society organized for the prevention of cruelty to animals and having jurisdiction in either of such cities is hereby empowered and authorized to carry out the provisions of this act and such Society is further authorized to issue licenses and renewals and to collect the fees for such as is herein prescribed, which fees are to be used by said Society towards defraying the cost of carrying out the provisions of this act, and maintaining a shelter for lost, strayed or homeless animals, *and for its own purposes.*

be destroyed; *but if not claimed and redeemed or destroyed within five days of the time of seizure, they shall then be destroyed.*

Sec. 7. The American Society for the Prevention of Cruelty to Animals is hereby empowered and authorized to carry out the provisions of this act, and the said Society is further authorized to issue licenses and renewals and to collect the fees therefor as herein prescribed, and the fees so collected shall be applied by said Society in defraying the cost of carrying out the provisions of this act and maintaining a shelter for lost, strayed or homeless animals; *and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said Society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the state as relate to the humane work in which the said Society is engaged.*

There has been no substantial change in the act.

It will be thus apparent that the only change is in omitting the words "for its own purposes" and substituting "as compensation for enforcing" certain statutes, viz.: the provisions of the Penal Code touching "cruelty to animals" and others relating to the work of the Society; and it scarcely needs to be argued that this was no change at all, for these were "its own purposes." In the meantime let us observe that the purpose designated in the two statutes remains precisely the same; and that Judge Cullen said (165 N. Y., p. 526) that "the statute, so far as it compels the owners of dogs to pay license fees to the defendant for the purposes described in the statute, is an unauthorized appropriation, etc.," and this is one of the purposes prescribed in the statute. He did not single out any one, but condemned all, including this one.

But let us look a little close at the real purport of both these clauses. The courts do not allow themselves to be hoodwinked by words; they look at the real thing involved. The Legislature cannot make a statute constitutional by any form of language, for "the courts scrutinize the act and see whether it really" is within the powers of the law-making body, no matter what that body may call it.

Matter of Jacobs, 98 N. Y., 110, 111;
Waterloo Co. v. *Shanahan*, 128 N. Y., 357.

Exercising this scrutiny here, it will be apparent that the Society has not succeeded in making the act less obnoxious than before. It is quite easy to discern the germ and theory of this amendment. On page 525 of the *Mohawk* case, Judge Cullen was discussing whether these license fees were devoted to a "governmental purpose" and then asked

(argued) "it cannot be said to be compensation for services done in the destruction of dogs," etc. This phrase has been seized upon and it has been fancied that if the act was made to say that the Society should retain the fees as compensation, it could exploit the public as before. But this is a delusion. The courts are not so easily deceived.

In the first place, see the connection in which Judge Cullen spoke of compensation. The Society's counsel argued that there was no gift of public moneys to a private corporation under the old act because the Society was something besides a private corporation, to wit, "a subordinate public or governmental agency." That makes no difference, says the Judge; suppose it is; suppose it has been created such "to assist in enforcing the criminal laws relative to cruelty to animals"; yet the devotion of these license fees to it as such is not a governmental purpose. It is a private corporation, and to give these public moneys even to enable it to carry out its corporate purposes in enforcing these laws is a gift of public moneys. The purposes of the Mohawk Society were:

> "The prevention of cruelty to animals and the enforcement of all laws which now or hereafter may be enacted for the protection of animals" (Charter of Mohawk and H. R. Society, Case on Appeal, *Fox v. Mohawk*, p. 16).

Yet the appropriation of license fees to this Society for its own, *i. e.*, its corporate purposes, viz., enforcing the laws against cruelty to animals, was held to be a gift and contrary to the Constitution. What is the difference whether they appropriate the money for the purpose of enforcing such laws

or as compensation for enforcing such laws? Is the difference not solely in words?

Again: The charter of the New York Society is entitled "An Act to Incorporate the American Society for the Prevention of Cruelty to Animals" (Ch. 469, L. 1866), and such is declared to be its purpose (Sec. 1).

The charter is in evidence as part of the case (*David* v. *Am. Soc.*, 75 N. Y., 362, 366), and its by-laws which the charter authorized (Sec. 5) declare its object to be "to provide effective means for the prevention of cruelty to animals—to enforce all laws which are now or may hereafter be enacted for the protection of animals," etc. Exactly the same, word for word, as the Mohawk Society.

Now, suppose these moneys are given to it by the Legislature as compensation for fulfilling the purposes of its existence; are they given to it for its own purposes? Is it made any better by calling it compensation? Could not any gift of public moneys be made by the use of that word? Any private corporation could be formed with a clause in its charter that it was intended to aid the Government—in cleaning streets, for instance—and all that would be necessary to escape the Constitution and give it public moneys would be to say that it was "as compensation."

Indeed, the Society's counsel in the *Fox* case argued that appropriations of license fees to its corporate purposes as above stated was not a gift to a private corporation but for the support of a governmental purpose, *i. e.*, compensation for performance of a governmental function.

In fact, the relations of this Society to the public and to the owners of dogs are precisely the same in every respect under the amended act as under the old; nothing has been changed but the words. If it was unconstitutional to compel the owners of dogs to pay moneys to the Society for the purpose of enforcing certain laws, it is unconstitutional to compel them to pay said moneys to the Society as compensation for enforcing the same laws.

It would seem silly to argue that proposition were it not that the Society has endeavored to fortify its continued violation of the Constitution by obtaining the opinion of Judge Andrews, formerly Chief Judge of the Court of Appeals.

In the acts of 1894 and 1895 the consideration, viz., the aid in enforcing the criminal laws, was just as fully present as in the act now considered; the purpose of the corporation for which it was founded was to do just that. It has no more or greater obligation to perform that service now than it had before. The introduction of the word "compensation" added nothing essential. If the consideration is actually paid it makes a contract binding even though not expressed. If it be not paid its expression in the contract does not help. The same essential facts were present in the *Fox* case, and yet the act was held to be void.

The Society was formed voluntarily; it applied for and obtained a charter for the purpose of aiding in the enforcement of laws against cruelty to animals with the means furnished by those who voluntarily became members and paid the sums specified in the by-laws for different classes (By-laws, Ch. III). From 1869 to 1894 it subsisted and performed its work with these resources. It was and is by its charter bound to carry out its pur-

poses (*Jamison* v. *C. S. Bank*, 122 N. Y., 135); and to appropriate to it public moneys for carrying out its purposes is necessarily a gratuity because there is no consideration for such appropriation. A performance of or a promise to perform that which a party is already bound to perform is not a legal consideration (*Scybold* v. *N. Y. L. E. & W.*, 95 N. Y., 562; *Vanderbilt* v. *Schreyer*, 91 N. Y., 392). The appropriation made by this act, therefore, is a gift under the guise of a recompense for services.

But there is another branch of this subject that has been overlooked. If the Legislature can impose a fee of $1 or $2, it can impose $100 or $1,000.

> "Questions of power do not depend upon the degree in which it may be exercised. If it may be exercised at all it must be exercised at the will of those in whose hands it is placed" (Marshall, *C. J.*, in *Brown* v. *Maryland*, 12 Wheat., 419; cited 98 N. Y., 106).

Suppose the license required to be paid was $1,000, it would at once be asked whether the burden imposed on the citizen bore any just relation to the value of the services rendered. The question is just as pertinent, though not so striking, when the fee is placed at $2, with $1 for renewal. There can be no question that the value of the paper certificate and the stamped tag is less than five cents. If it be regarded as payment for these, it is clear that all the rest of the fee is a gift to the Society, just as much as it would be to pay a beggar a dollar for a five-cent lead pencil. But the peyment is claimed to be as compensation for services in assisting in administration of the criminal law. Let us

inquire whether this stands on any different footing.

It is well regarded and conceded that the State or a municipality can enter into a contract for the performance of any public work (not required to be performed by a public officer), but it must be done according to law.

The statutes are full of elaborate provisions for ascertaining their fair and lowest value, for submitting to competitive bidding in cases of contract, and for audit by some responsible public officer or board in other cases. The provisions are intended to secure to the citizen the assurance that he and the public will receive fair and full value of the moneys or property exacted by the Government.

The Society can diligently enforce the statutes against cruelty, or can do so perfunctorily and sporadically, or not at all. The amount it receives from license fees may be less than its services are worth, or equivalent, or they may be more. No one knows and no one is authorized to find out—at all events, no one on behalf of the public, in any judicial or quasi-judicial proceeding. Unlike a public officer, it is not subject to impeachment or removal or suit for malfeasance or neglect or mandamus (64 N. Y., 101). It may receive these license fees and do nothing; it may do a little and receive much; and in such case it would be the recipient of a gift at the hands of the Legislature; the test of the constitutionality of a statute is not what is, but what may be done under its provisions.

POINT I.

The statutes in question have already been declared unconstitutional.

The American Society for the Prevention of Cruelty to Animals is a private corporation created by an act of Legislature—Chapter 469, Laws of 1866.

By the Laws of 1894, Chapter 115, and its amendments, Chapter 412 of 1895 and Chapter 448 of 1896, a right was given to said Society to collect fees for licensing dogs. These laws were thereafter declared unconstitutional by the Court of Appeals in the case of *Fox v. Mohawk & Hudson Humane Society*, 165 N. Y., 517. Chapter 495, Laws of 1902, was thereafter enacted, intending to cure the criticism of the Court of Appeals in said case. This said last-mentioned law as amended was declared unconstitutional by Mr. Justice Stevens in the County Court of Richmond in 1907, without opinion, in the unreported case of *People et al. v. Cameron*. Thereafter and in 1908, Mr. Justice Kelly, in effect, declared said law unconstitutional in the case of *Coler v. American Society for the Prevention of Cruelty to Animals*, reported in 1910 in 122 N. Y. S., 349.

At page 352 the learned Justice said:

> "But if it be said that these matters are within the domain of the Legislature, I still think there is a grave doubt whether the amendments to the statute cited have removed all of the objections referred to by the Court of Appeals in *Fox v. Mohawk & Hudson River Humane Society*. In that

case a similar statute was declared unconstitutional for various reasons referred to in the opinion of Judge Cullen, writing for the Court. The statute was thereupon amended, with the purpose of avoiding the unconstitutional provisions commented upon by the Court. I have read with interest and with great respect the opinion of former Chief Judge Andrews, given to the defendant, in which he holds that the act, in its present form, obviates the objection sustained in the *Fox* case, and undoubtedly this has been done as to most of these objections. But there remains the objection to the act in question pointed out by Judge Cullen at page 524 of 165 N. Y., which I think remains. I do not believe that the Legislature can vest any such power as it is sought to be conferred here in a private corporation. The agents to go into the streets of the city and seize these animals are not public officers. They are selected by the defendant and responsible to it. They have power to take these dogs from the owners and deliver them to the defendant. It is a misdemeanor to interfere with these persons. They are described in the act as officers and agents of the society. They are vested with powers greater, in some respects, than public officers bound by oath and responsible to the public. I think the public health should be protected by the State or municipality, acting through their duly designated representatives. There can be no question as to the power of the Legislature to provide for the licensing of dogs, or for the protection of the citizens by appropriate regulations and rules governing the keeping of dogs, but great danger may result from delegating to those private corporations, duties which belong to the public, and which should be performed by public officers."

A similar act has also been declared unconstitutional in the State of Ohio, in the case of *Fagin v. Ohio Humane Society* (Ohio decision, Superior Common Pleas, Vol. IX), page 341

The statute under which the Ohio Humane Society conducted its operations provided that license fees should be paid to the City Auditor (giving color at least to the legality of the act), and it also provided that money so collected should be paid over to the said Society for the purpose of defraying the costs of carrying out the provisions of the act. The fees were paid to the Society as compensation for its services. But this in no manner relieved the act of its vicious features, nor breathed into it the breath of constitutional life and being. The act was declared unconstitutional on several grounds. The Court said:

> "The second ground, it seems to the Court, presents the most serious question of the statute, and that is, that the law is in violation of the fifth amendments to the constitution of the United States, and art 1, sec. 19, of the constitution of Ohio, by which property cannot be taken without due process of law, and that private property in Ohio shall be held inviolate. Without going into any elaborate discussion of the question of property in dogs, suffice it is to say that the court is satisfied that dogs are now considered property in this state. Section 2754, Rev. Stat., provides for the listing and taxation of dogs, and sec. 7008, Rev. Stat., recognizes them as property.
>
> Our own circuit courts, also, recognize and have held to all intents and purposes that dogs are property. The act in controversy contemplates a confiscation of property without judicial hearing and judgment, and such confiscation without judicial hear-

ing and judgment with due notice is void, as not being due process of law. It is an inflexible principle of constitutional right that no person can legally be divested of his property or against his will unless he be allowed a hearing before a tribunal where he may contest the claim set up against him, and be allowed to meet it on the law and facts. By the words 'Due process of law' must be understood to mean the law of the land. That is, the law of the state of Ohio, and of the United States. In other words, that no person shall be deprived, by any form of governmental action, of either life, liberty or property except as the consequence of some judicial proceeding appropriately and legally conducted. Hey Sing Leck v. Anderson, 57 Cal., 251; Lowry v. Rainwater, 70 Mo., 152.

It is a well known fact that large amounts of money are now invested in dogs. They are largely the subjects of trade and traffic. In many ways they are put to useful service, and so far as pertains to their ownership as personal property, they possess all the attributes of other personal property. Many people traffic in the breeding and raising of dogs for the purpose of sale, and as a kind of personal property, dogs of various and different breeds have their values the same as any other kind of animal bred and raised by fanciers of that particular kind. There can be no doubt, therefore, that the right of property exists in dogs, and if the right exists, then it follows that dogs will receive protection from the law and from mankind. In holding, therefore, that this law contravenes the constitution holding property inviolate, and therefore unconstitutional, does not deprive the legislature or the city council from passing such regulations or ordinances as they may deem best for the pro-

tection of the people as against dogs running at large. It is well settled that a city council or the legislature may regulate, and it would be within the constitutional limitations for such regulation to have the running of dogs at large regulated as by paying licenses, or by their muzzling, or by such police regulation as the legislature or council may see fit to impose.

Most of the cases cited by the defendant turn upon the police regulations of dogs running at large which have been brought to the attention of the various Supreme Courts in the cases cited, in which it has been originally held that such regulations could be had; but under the act in this case there is no distinction made between dogs running at large or dogs that may be kept or harbored at home where they interfere with no person. There is no distinction made between vicious and mad dogs or perfectly harmless ones, but all dogs, whether they are at large on the streets, or whether they are within the home of their owner, are to be seized by the defendant society and destroyed or otherwise disposed of.

This question, while not by a court of last resort, has been determined by the Supreme Court of the State of New York in Fox v. Mohawk and H. R. Humane Society, 48 N. Y. Sup., 625, in which the law is almost identical with the one in question here, and in which the argument of defendant as raised in that case is similar with the one at bar, and while the lower court sustained the constitutionality of the act, the Supreme Court, all the judges concurring, held that the act was unconstitutional and the defendant in that case, as in this case, admitted that unless restrained by the order of the court the society would seize and destroy, or otherwise dispose of, the property of the plaintiff. The Court in that case said:

'That no person has the right to own or harbor a dog except licensed by the defendant. By paying the defendant one dollar a person would get a license for his dog no matter how mad, vicious or diseased it may be. If he does not choose to pay the dollar, the defendant can confiscate the dog, unless redeemed within 48 hours by paying two dollars. The defendant need not kill the dog it confiscates, but may sell it, and the defendant can manage its business upon a basis most thrifty to itself, thus placing the public service at the mercy of the corporate interests, and requiring an individual to pay a private corporation for a sovereign favor seems to be contrary to the fundamental principles of popular government.'

And so far as this act is concerned, the city of Cincinnati stands merely as the collector for the license fees which would be due under the act to the Ohio Humane Society.

There is a fallacy in the defendant's argument that the Ohio Humane Society stands as the practical representative of the police power of the state of Ohio for the reason that the police power of the state and of a city could not be delegated to any corporation, but must be exercised by individuals, who, as individuals, are capable of taking oath of office, thereby fixing their responsibility and liability."

POINT II.

The statute in question does not come within the exercises of the police power of the State.

The plaintiff-in-error concedes that if this statute fell within the limitation of the police power of the State, and was a proper exercise of such power, the decision of the highest court of the State would be final and conclusive.

This statute, however, does not come within the beneficent domain of the police power. It does not purport to be enacted in the interests of the public or of owners of dogs, or the protection of animals generally, nor does it purport to be enacted in connection with the health, comfort or protection of the community in general.

The license fee must be paid by the owners of or persons who harbor dogs, irrespective of whether any such dog is bad, good or indifferent. The rabid, vicious or other dog is not mentioned in the statute. It is not a statute regulating the kind or character of dogs to be kept. The underlying purpose of the act is to provide a source of revenue for this private corporation from the owners of dogs, and these moneys may be used to provide a shelter for homeless or other stray dogs, and towards the other work to which the society is engaged.

> "Doubtless the legislature might discriminate between different breeds of dogs and provide that certain breeds should not be harbored within the state, while others it could suffer to be kept. It might subject the keeping of dogs to restrictions which, by reason of their conditions, might in prac-

tice discriminate as to the right to keep dogs. If this classification was fairly adapted to the destruction of vicious dogs or dogs of vicious breed, or to keeping dogs under such conditions as to prevent their endangering the persons or health of the members of the community, it would be a valid exercise of the police power and justifiable. But under the law before us no distinction is made between the breeds or individual characters of dogs, nor as to the manner in which dogs may be restrained and kept."

Fox v. *Mohawk & H. R. Humane Society*, 165 N. Y., p. 519, at p. 527.

"The grant of a license is the exercise of sovereign power. To require the individual to pay a private corporation for sovereign favor, seems to be contrary to the fundamental principles of the popular government. We have no doubt the defendant is a most worthy institution, but however great its merits, they cannot obscure the vice of such legislation."

Fox v. *Hudson R. H. S.*, 25 App. Div., p. 26, at pp. 33-34

POINT III.

The nature of the license required of the plaintiff-in-error.

The statute in question requires the payment of a so-called license for keeping a dog and the keeping of a dog without paying such license to this private Society is made a criminal offense punishable by a fine or imprisonment.

This license is not issued under the police power of the State and has nothing whatever to do with, and is not required under the exercise of such police power for the reasons hereinbefore discussed. In fact, the payment of the license is a mere formality. The money is appropriated from the plaintiff-in-error directly to the Society and this money is paid to the Society solely and only for the purpose of increasing the revenues of the Society. It is, therefore, the imposition of a tax and the Society is constituted a tax collector.

> "The license is issued under the police power; but the exaction of a license fee with a view to revenue would be the exercise of the power of taxation."
>
> *Cooley on Constitutional Limitations* (4th edition), p.* 201.

> "Taxation, having for its legitimate object the raising of money for public purposes and the proper needs of the government, the exaction of moneys from the citizens for other purposes, is not a proper exercise of this power, and must, therefore, be unauthorized."
>
> *Cooley, id.*, p.* 487.

This Court in an important case has defined the meaning of the term "license" as follows:

> " 'The property of a citizen is, to some extent, in the power and at the disposal of the government. Its use may to some extent be regulated. It may be condemned by appropriate process as injurious to the health, or morals, of the public; or, to the well being and safety of the state; it is liable to be taken for public purposes upon just compensation

made; and is liable to assessment and taxation for the general purposes of the government, or for local benefits and improvements. But the citizen does not hold his property by so slight a tenure that it can be taken from him by the legislature for any and all purposes, either under the guise and power of taxation, or color or pretense of exercising any of the other recognized powers of the government. All power in the legislature over the property of the citizen, is derived from the people, and is either directly conferred by the terms of the constitution, or impliedly granted, as incidental to some power expressly given, or results from the necessities of government, and exists as an incident to government.' (Clark v. City of Rochester, supra.) Authorizing a town, through its officers, or by commissioners, to donate its property to a private, or *quasi*, public corporation, is not among such express or implied powers.

The property of the citizen cannot be taken from him without his consent, except by due process of law, or by eminent domain, or by taxation. Against any other mode he is protected."

Sweet v. *Hulbert*, 51 Barb., 312, at pp. 321-322.

"If the legislature can take the property of A. and transfer it to B., they can take A. himself and either shut him up in prison or put him to death. But none of these things can be done by mere legislation. There must be due process of law. * * * But again, I am not prepared to admit that the legislature of a state possesses any such power as would authorize them to take the property of one person and give it to another, against the consent of the owner, were there no such prohibition contained in the constitution. * * *

The legislature, however, is not supreme under our form of government. It is only one of the organs of that absolute sovereignty which resides in the whole body of the people. (4 Hill, 144.) It was said by the late Justice Story, in the case of Wilkerson v. Leland (2 Peters, 657), 'That a government can scarcely be deemed to be free when the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.' Again, he says, 'We know of no case in which a legislative act to transfer property of A. to B. without his consent has ever been held a constitutional exercise of legislative power, in any state in the union. On the contrary, it has constantly been resisted as inconsistent with first principles, by every judicial tribunal in which it has been attempted to be enforced.' I maintain, therefore, that the security of the citizen against such arbitrary legislation rests upon the broader and more solid ground of natural rights, and is not wholly dependent upon these negatives upon the legislative power contained in the constitution. It can never be admitted as a just attribute of sovereignty in a government to take the property of one citizen and bestow it upon another. The exercise of such a power is incompatible with the nature and object of all government, and is destructive of the great end and aim for which government is instituted, and is subversive of the fundamental principles upon which all free governments are organized. This was a power repudiated by the Romans during the whole reign of imperial despotism, and has ever been a maxim of the civil law. And the right of the subject against the exercise of

> such arbitrary power was asserted in England as one of the sovereign rights of the citizen, and forms a part of the 29th chapter of magna charta. * * * In a case like this, the court can never find a motive to transcend its duty, and I trust it will always be found to possess independence enough to do that."
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> *Mason, J.*, in *White* v. *White*, 5 Barbour's Reports, p. 474, at p. 484.

The taxing power of the Government being transferred to this private Society is exercised unlawfully, as it taxes the property of a private citizen for no government purpose and transfers it to a private society and contervenes the solemn injunction of the Constitution against depriving a citizen of his property without due process of law.

It is an interesting question as to what consideration should be given by a State court to a decision of the Supreme Court of the United States upon a question of constitutional law, rendered in the exercise of its jurisdiction, where the point in judgment relates to the validity of the State statute, which is challenged on the ground that it deprives a party of life, liberty or property without due process of law, and the decision affirms the constitutionality of the statute. The jurisdiction of the Supreme Court of the United States to review the decision of a State court, sustaining a State statute which is alleged to be a violation of this constitutional principle, originated with the adoption of the Fourteenth Amendment of the Constitution of the United States, which, for the first time, introduced into the Federal Constitution the prohibition, "Nor shall any State deprive any person of life, liberty or property without due process

of law." This was a new limitation in the Federal Constitution on the State governments. Prior to the adoption of the Fourteenth Amendment personal rights and rights of property were, as a rule, exclusively matters of State cognizance, and the State courts were the ultimate tribunals for the termination of the questions arising under the constitutional guaranty of life, liberty and property, which was found only in the State constitutions. Their decisions were not subject to review in the courts of the United States. (*Slaughter-house Cases*, 16 Wall., 36.) There were exceptions growing out of Article 1, Section 10, of the Federal Constitution, that "no State should pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts," not material here. Since the Fourteenth Amendment the question whether a State statute infringes the constitutional guaranty protecting life, liberty and property, where it arises in a State court, involves the consideration of both the Federal and State constitutions, although the ground of construction and decision is identical under either instrument. But whether the decision of the State court presents a Federal question reviewable on appeal to the Supreme Court of the United States depends on the nature of the decision of the State court; that is to say, whether it affirmed the validity of the statute, or held it to be unconstitutional and void. If the State court decides that the statute does violate the constitutional guaranty, its decision is now, as before the Fourteenth Amendment, final and conclusive, and no appeal can be taken to the Federal court, as in that case no right under the Constitution and laws of the United States has been denied. If, on the other hand, the State court sustains the statute and

denies the right asserted, the Federal jurisdiction attaches, and an appeal may be taken to the United States Supreme Court. It cannot be maintained, we think, that a decision of the Federal court sustaining a State statute is *res adjudicata* and binding upon a State court, when the same question subsequently arises there under a similar statute. It would still be the duty of the State court to examine the question and decide it according to its interpretation of the constitutional guaranty. But the respect due to the decision of that high tribunal, the fact that to it has been committed, by the consent of the States, the ultimate vindication of liberty and property against arbitrary and unconstitutional State legislation, and the fitness of things, emphasize and enforce, in the particular case, the settled rule that only when required by the most cogent reasons, nor, indeed, unless compelled by unanswerable grounds, will a Court declare a statute to be unconstitutional.

People v. *Budd*, 117 N. Y., p. 1, at pp. 12-14.

If any right, privilege or immunity claimed under the Federal Constitution or law be denied by this court, its decision is reviewable in the Supreme Court, and in such cases it is our duty to follow in the footsteps of that Court and to be guided and controlled by its decisions. But in this case the right is claimed under our State constitution, and in matters pertaining to its proper construction our decision is final, excepting that if, as construed by us, the Constitution or our laws deny the existence of some right or privilege claimed by a party by virtue of the Federal Constitution or laws, our decision is reviewable by the Federal

court not for the purpose of reviewing our construction of our own Constitution or laws, but to see whether, under the Constitution or laws as construed by us, any right or privilege existing by virtue of the Federal Constitution or laws has been violated or denied, and, if so, to give it effect, notwithstanding the State law or constitution.

People v. *Budd*, 117 N. Y., p. 1, at p. 33.

In my opinion the Court should not strain after holding such species of legislation constitutional.

People v. *Budd*, 117 N. Y., p. 1, at p. 69.

It is contended in behalf of the defendant that the law under which he was convicted violates Section 1 of Article 14 of the Constitution of the United States, which prohibits any State from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the law, and those provisions of the constitution of this State which enact that no member of this State shall be disfranchised or deprived of any of the rights or privileges, secured to any citizen thereof, unless by the law of the land and the judgment of his peers, nor be deprived of life, liberty or property without due process of law. (Const., Art. 1, Secs. 1, 6). The words "law of the land" do not mean an act of the Legislature passed for the very purpose of working the wrong. The meaning is that no person shall be deprived of any of the rights or privileges secured to him by the Constitution, unless the matter shall be adjudged against him upon a trial had according to law. It cannot be done by mere legislation.

People v. *Lochner*, 177 N. Y., p. 145, at pp. 178-179.

The provisions of the Labor Law of the State of New York providing that no person shall be required or permitted to work in a bakery more than sixty hours in a week, or ten hours a day, is not a legitimate exercise of the police powers of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such is in conflict with, and void under, the Federal Constitution.

Lochner v. *New York*, 198 U. S., 45, at p. 56; reversing 177 N. Y., 145.

"It must, of course, be conceded that there is a limit to the valid exercise of the police power of the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal

liberty. * * * We think the limit of the police power has been reached and passed in this case. * * * A statute regulating the trade of horseshoeing and requiring the person practising such trade to be examined and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law."

Lochner v. State of New York (supra).

The legislation in question cannot be distinguished from any legislation which would authorize the taking of private property for a private purpose. Assume an institution established for the care of abandoned or neglected children and authority to such institution to collect $2 from each family having children for as many children as there may be in a given family, how would such legislation be regarded?

The State in its protection of children may tax its inhabitants for such purposes. If it does not render such care directly in its own institutions it may enter into contracts with institutions to render such service, but may not constitutionally surrender its sovereign power to private institutions and confer upon private institutions power to collect moneys, whether designated license fees or otherwise, directly from the inhabitants of a community generally.

An act of the Legislature authorized the town of Saratoga to issue bonds to aid in the construction of a railroad and provided that the moneys

raised therefrom should be donated to such railroad corporation to build and operate such road.

The Court said:

> "That instrument (the Constitution) declares that no person shall be deprived of property without due process of law. Legislative enactment is not due process of law. Nor shall private property be taken for public use without just compensation. The use specified by this act is not a public use, but a donation to a private company; the pretense is to aid in the construction of a work which the public may use by paying for the privilege; still, it is private property; besides there is no obligation imposed, or security required, that this work shall ever be completed."
>
> *Sweet* v. *Hulbert*, 51 Barbour Rep., 312, at p. 319.

The Legislature might authorize a town to subscribe for stock in a railroad, issue its bonds or raise money by tax to pay for the same. In the above case the Court said that the gift "is positive, the use directory."

> "The Legislature has no constitutional right to * * * lay a tax, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. * * * This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation and becomes plunder."
>
> *Tiedeman's Limitations of Police Power*, p. 475, Note.

"The one general object * * * whatever other reasons may be assigned for the requirement of a license in any particular occupation, can only be the providing of a reliable source of revenue. It is one of the 'ways and means' of defraying current expenses. * * * Whatever refinements of reasoning may be indulged in, there are but two substantial phases to the imposition of a license tax on professions and occupations. It is either a license, strictly so called, imposed in the exercise of the ordinary police power of the state, or it is a tax, laid in the exercise of the power of taxation."

Tiedeman's Limitations of Police Power, p. 272.

This Court, in reversing a judgment of the highest Court of the State of New York, said:

"The State of New York maintains the constitutionality of these laws; and their legislature, their council of revision, and their judges have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United States expect from this department of the government."

Gibbons v. *Ogden,* 9 Wheaton, 1-240.

"In the argument we have been reminded by one side of the dignity of a sovereign state, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity; by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

To these admonitions we can only answer, that, if the exercise of that jurisdiction which has been imposed upon us by the constitution and laws of the United States shall be calculated to bring on those dangers which have been intimated, or if it shall be indispensable to the preservation of the union, and consequently of the independence and liberty of these states; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law, and can tread only that path which is marked out by duty."

Craig et al. v. *State of Missouri*, 4 Peters R., 411.

"Powerful and ingenious minds, taking as postulates that the powers expressly granted to the government of the union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the states are retained, if any possible construction will retain them, may by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use."

Gibbons v. *Ogden*, 9 Wheaton, 1-240.

"The constitution and laws of a state, so far as they are repugnant to the constitution and laws of the United States, are absolutely void. These states are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate."

Cohens v. *State of Virginia,* 6 Wheaton's R., 264.

"The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"

McCulloch v. *State of Maryland et al.,* 4 Wheaton's R., p. 316.

"The word 'license' means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer, to do what is within the terms of the license."

Gibbons v. *Ogden,* 9 Wheaton, 1-240.

"There is no specific prohibition in the Federal constitution which acts upon the states in regard to their taking private property for any but public use. The fifth amendment, which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the Federal government, as has many times been decided. * * *

> In the fourteenth amendment the provision in regard to the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise or by assertion of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal government."

POINT IV.

The defendant-in-error performs no governmental functions, nor may the right to perform such functions be constitutionally delegated to a private individual or corporation.

Both the Appellate Division of the Supreme Court of the State of New York and the Court of Appeals, in the *Fox* case, have made clear the distinction between powers granted to a private corporation as incidental to the main power granted to a public official, and governmental powers directly granted to a private corporation.

> "It is thus seen that the powers assumed to be vested in the defendant are not merely to render services incidental to the execution of powers of some other official determined, such as the receipt of a tax which the defendant ought to pay, but they embrace

the execution of all powers which the state has suspended over the plaintiff's rights and liberties in respect of his keeping this kind of property, including those of a discretionary kind, authorizing its destruction or sale—in short, police powers. The grant of a license is the exercise of sovereign power. To require the individual to pay a private corporation for the sovereign favor seems to be contrary to the fundamental principles of popular government."

25 App. Div., at p. 33.

"In Trustees of Exempt Fireman's Fund v. Roome (93 N. Y. 313), a case much relied upon by the defendant, the phrase 'subordinate governmental agency' was applied to the plaintiff as justifying its right to receive a license fee or tax which the state had imposed upon certain foreign insurance companies doing business in the city of New York, as the price of admitting them to the privileges of doing business within this state. The right of the state to impose the tax or license fee for its own purpose was held to be clear. The right of the plaintiff to receive and use it for its own corporate purposes was challenged, among other reasons, because it was a gift of public money to a corporation, and thus forbidden by the constitution. * * * The court held that it was not a gift but payment by the state to the exempt firemen, members of the plaintiff corporation, of the money the state morally owed them for their past services, and as well an appropriation to the public use, and that, in giving the money to the corporation, the state selected it as a 'subordinate governmental agency,' employed by the state to fulfil its obligations due to the exempt firemen for services they had rendered at the

request and by the government of the state.

It is obvious that the corporation plaintiff in that case had simply the function of collecting certain moneys appropriated to it, and applying them to the use of the exempt firemen, members of the corporation. In that sense the term 'subordinate governmental agency' has a meaning much too narrow to cover the functions which the act of 1896 seeks to confer on the defendant."

26 App. Div., p. 30.

"* * * *It is contended, however, that the defendant, though a corporation organized by the voluntary acts of individuals, is a 'subordinate governmental agency,' and that an appropriation of money to its use is but an appropriation of money for the support of the government and not within the constitutional restrictions.* If it were necessary for the disposition of this case, agreeing with the view of the learned Appellate Division I certainly should deny the right of the legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of the citizens, except that of eminent domain, to be exercised for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me (p. 525). *Of course, the State or any of its subdivisions may employ individuals, or corporations, to do work or render service for it; but the distinction between a public officer and a public employee or contractor is plain and well recognized* (People ex rel. Percivel v. Cram, 164 N. Y., 167; Mecham on Public Officers, Sec. 2). I do not base my judgment exclusively on the view that a corporation cannot take an oath

of office, for the acts of the corporation must be done by agents who are natural persons.

In many cases the legislature has created corporations from boards of public officers. *My chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens)*; that the agents or officers of the corporation are appointed such by the corporators and that if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public officers on a few of the citizens, and possibly persons not citizens, while under the constitution all public officers must be elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people (see Ames v. Port Huron, etc., Co., 11 Mich., 139; State v. Kenyon, 7 Ohio St., 547; State ex rel. Clark v. Stanley, 66 Carolina, 59). *But if we assume that the legislature can create and has created this defendant 'a subordinate governmental agency,' to assist in the enforcement of the criminal laws relative to cruelty to animals, still that assumption will not establish the proposition that the devotion of these license fees is to a governmental purpose.* * * *"*

165 N. Y., p. 524.

"The views we have expressed are not inconsistent with the recent decision in this court in People ex rel. State Bd. Charities v. New York Society for the Prevention of Cruelty to Children (161 N. Y., 233). In that case the only question before the Court was whether the defendant was an institution of 'charitable, elemosynary, correctional

or reformatory' character within the nomenclature of Section 11, Article VIII, of the Constitution, and, therefore, subject to the visitation of the State Board of Charities, a question not at all involved in this case. Nor is the result reached in conflict with the decision in Trustees of Exempt Firemen's Benevolent Fund v. Roome (93 N. Y., 313), in which the validity of an appropriation of a percentage of the premiums received by foreign fire insurance companies to the relief of exempt firemen was upheld. The decision in that case proceeded on the ground that the volunteer fire department for more than a hundred years had been a recognized agency of the municipal (p. 328) government, and that an appropriation of money to the benevolent fund of the firemen was but a recognition of the obligation due from the State to the members of the department for their services. Judge Finch there said: 'The precise relation of these firemen to the municipality and the State it is not easy to describe. They were not civil or public officers within the constitutional meaning (People v. Pinckney, 32 N. Y., 392), and yet must be regarded as the agents of the municipal corporation. Their duties were public duties; the service they rendered was a public service; their appointment came from the common council and was evidenced by the certificate of the city officers; they were liable to removal by the authority which appointed them; and were intrusted with the care and management of the apparatus owned by the city. They were, at least, a public body, and perhaps are best described as a subordinate governmental agency.' It must be admitted that the status of these firemen was somewhat anomalous, and the description formulated by Judge Finch, 'subordinate governmental agency,'

was doubtless the best characterization of it. But the case must not be considered as authority for the doctrine that the administration of government generally can be confided to 'subordinate governmental agencies' in the shape of corporations or associations. One vital distinction between the fire department and the defendant is this: As to the former, membership in the department as well as its discipline and management were at all times subject to the control and regulation of the common council of the city; while membership in the defendant may be accorded or withheld at its pleasure and the management of the corporation and the selection of its officers is wholly vested in the corporators."

165 N. Y., at pp. 527-528.

POINT V.

The sovereign power of the State is delegated to a private corporation to the detriment of the individual and constitutes a violation of the guaranty against being deprived of liberty and property without due process of law.

The sole question here is, may the State grant the privilege to A to collect moneys from B (both private individuals) on pain of B's being cast into prison if he does not pay A for the enjoyment of certain privileges. Under this statute if the money is not paid B is declared guilty of a crime and ordered imprisoned.

Multitudes of our people are affected by this vicious legislation and resent the payment of moneys to this private corporation. This legislation has engendered discontent and opposition, and the idea

is irresistible that this private corporate interest is invading private rights and liberty. That this very thing is accomplished has been stated by the learned Judge writing in the *Fox* case, on behalf of the Appellate Division of the Supreme Court, when he said:

> "The phrase 'subordinate governmental agency,' which was there used with great hesitation and caution, would be misapplied and abused if perverted into a justification of the corporate invasion of the people's right to be governed by officers chosen from among themselves, and from the like invasion of their right to be secure from deprivation of their property without due process of law."
> *Fox Case (supra)*, 25 App. Div., at p. 34.

POINT VI.

It is respectfully submitted that the judgment below should be reversed and the fine remitted.

JOSEPH NICCHIA,
GEORGE P. POULK,
Counsel for Plaintiff-in-Error.

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 74.

LILLIAN NICCHIA,
Plaintiff-in-Error,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

Brief for Defendant-in-Error.

HARRY E. LEWIS,
District Attorney,
Kings County, New York.

ARRY G. ANDERSON,
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ILLIAM N. DYKMAN,
Of Counsel.

1920
Stillman Appellate Printing Co.
New York.

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To be argued by
William N. Dykman,
for Defendant-in-Error.

Supreme Court of the United States,

OCTOBER TERM, 1920.

No. 74.

MARY NICCHIA,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

Error to the County Court, Kings County, New York, which affirmed a judgment of a City Magistrate's Court, Brooklyn, convicting the plaintiff-in-error of harboring two dogs for which licenses had not been procured.

Statement of Facts.

The appellant was charged before a City Magistrate in the City of New York with harboring two

dogs, without having procured a license provided for by Chapter 115 of the Laws of 1894, of New York.

The "Magistrate's Disposition" (Record, p. 1) states:

> "Defendant, by Joseph Nicchia, attorney, 256 Broadway, Manhattan, pleads not guilty. Later counsel for defendant stipulates (and defendant acquiesces in such stipulation) that defendant has, owns and harbors 2 dogs; that she has no license for them; that she declined to obtain such license on the ground that the statutes and laws requiring such a license or giving the society the right to collect any money or tax for dog licenses is unconstitutional. On the foregoing stipulation and the defendant waiving any proof of facts, I find the defendant guilty of harboring and owning a dog in the corporate limits of the city without having a license therefor. The defendant asks immediate sentence."

She was fined $10 and paid it under protest. The County Court, the Appellate Division, Supreme Court, and the Court of Appeals affirmed the conviction. The Court of Appeals allowed a writ of error (Record, p. 22).

The Statute Under Which Plaintiff-in-Error was Convicted.

The act in question, to wit, Chapter 115 of the Laws of 1894 as amended by Chapter 412 of the

Laws of 1895 and Chapter 495 of the Laws of 1902, is as follows:

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"SECTION 1. Every person who owns or harbors one or more dogs within the corporate limits of any city having a population of over eight hundred thousand shall procure a yearly license and pay the sum of two dollars for each dog, as hereinafter provided; and in applying for such license the owner shall state in writing the name, sex, breed, age, color and markings of the dog, for which the license is to be procured. (As amended by Laws 1895, Ch. 412.)

"SEC. 2. Licenses granted under this act shall date from the first day of May in each year, and must be renewed prior to the expiration of the term by the payment of one dollar for each renewal. (As amended by Laws 1895, Ch. 412.)

"SEC. 3. Each certificate of license or renewal shall state the name and address of the dog, and also the number of such license or renewal. (As amended by Laws 1895, Ch. 412.)

"SEC. 4. Every dog so licensed shall, at all times, have a collar about its neck, with a metal tag attached thereto, bearing the number of the license. Such tag shall be supplied

to the owner with the certificate of license and shall be of such form and design as the society empowered to carry out the provisions of this act shall designate, and duplicate tags may be issued only on proof of loss of the original and payment of the sum of one dollar therefor. (As amended by Laws 1895, Ch. 412.)

"SEC. 5. Dogs not licensed pursuant to the provisions of this act shall be seized, and if not claimed and redeemed within forty-eight hours thereafter they may be destroyed; but if not claimed and redeemed or destroyed within five days of the time of seizure, they shall then be destroyed. (As amended by Laws 1902, Ch. 495.)

"SEC. 6. It is further provided that any cat found within the corporate limits of any such city without a collar about its neck bearing the name and residence of the owner stamped thereon, may be seized and disposed of in like manner as prescribed above for dogs. (As amended by Laws 1895, Ch. 412.)

"SEC. 7. Any person claiming a dog or cat seized under the provisions of this act, and proving ownership thereof, shall be entitled to resume possession of the animal on payment of the sum of three dollars, provided, however, that such claim shall be made before the expiration of Forty-eight hours as provided in section five. (As amended by Laws 1895, Ch. 412.)

"SEC. 8. The American Society for the Prevention of Cruelty to Animals is hereby empowered and authorized to carry out the provisions of this act, and the said society is further authorized to issue the licenses and renewals, and to collect the fees therefor, as herein prescribed; and the fees so collected shall be applied by said society in defraying the cost of carrying out the provisions of this act and maintaining a shelter for lost, strayed or homeless animals; and any fees so collected and not required in carrying out the provisions of this act shall be retained by the said society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the State as relate to the humane work in which the said society is engaged. (As amended by laws of 1902, Ch. 495.)

"SEC. 9. Any person or persons, who shall hinder or molest or interfere with any officer or agent of said society in the performance of any duty enjoined by this act, or who shall use a license tag on a dog for which it was not issued, shall be deemed guilty of a misdemeanor. Any person who owns or harbors a dog, without complying with the provisions of this act shall be deemed guilty of disorderly conduct, and upon conviction thereof before any magistrate shall be fined for such offense any sum not exceeding ten dollars, and in default of payment of such fine may be committed to prison by such magistrate until the

same be paid, but such imprisonment shall not exceed ten days. (As amended by Laws 1895, Ch. 412.)

"SEC. 10. None of the provisions of this act shall apply to dogs owned by non-residents passing through the city, nor to dogs brought to the city and entered for exhibition at any dog show. (As amended by Laws 1895, Ch. 412.)

"SEC. 11. The thirteenth subdivision of section eighty-six, of chapter four hundred and ten of the laws of eighteen hundred and eighty-two, entitled 'An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York,' and all other acts and parts of acts inconsistent with the provisions of this act are hereby repealed. (As amended by Laws 1895, Ch. 412.)"

Brief Analysis of Provisions of Statute.

Under this law it is the duty of the American Society within the limits of the City of New York to license every dog whose owner applies for a license and to furnish the metal tag the dog is to carry, and to furnish a memorandum of the license stating the name, sex, breed, age, color and markings of the dog. It is further the duty of the Society to seize dogs not licensed, to hold them for forty-eight hours in the shelter it is required to maintain, to surrender the dog to the owner if claimed, and to destroy the dog within five days if

not claimed or redeemed. It is further its duty to seize and destroy homeless and wandering cats not bearing a collar stating the name and residence of the owner. The Society is required to maintain a shelter for lost, strayed or homeless animals. For all this work it receives for each dog license issued the sum of two dollars; for each dog or cat redeemed three dollars and for every duplicate tag issued, one dollar.

The Work of the Society.

The Society has erected and equipped three shelters, one each in the Boroughs of Manhattan, Brooklyn and Richmond, all provided and equipped for the sanitary housing and proper treating of animals; it has devised and installed a humane method of destroying sick, injured and unclaimed dogs and cats. Proper records are kept and every means employed to protect the animals and the interest of the owners. Ambulances especially constructed for the purpose are maintained and operated and two ambulance houses or stables are maintained by the Society.

The Society has gradually become one of the most important, useful and popular charitable societies in the City of New York, its general work comprising a wide field and the contribution of the public to its maintenance being confined to license fees—which it in turn applies to that particular.

The law provides (*supra*, p. 5):

> "and any fees so collected and not required in carrying out the provisions of this act shall

be retained by the said Society as compensation for enforcing the provisions of title sixteen of the penal code and such other statutes of the state as relate to the humane work in which the said Society is engaged."

This is hire and salary and not the devolution of a public duty upon a public officer.

Article XVI of the Penal Law deals with cruelty to animals, and in a number of actions makes cruelty a misdemeanor. The headnotes of the several sections defining misdemeanors are as follow (the text is omitted because of length):

Section 181. Keeping a place where animals are fought.

Section 182. Instigating fights between birds and animals.

Section 185. Overdriving, torturing and injuring animals; failing to provide proper sustenance.

Section 186. Abandonment of disabled animals.

Section 187. Failure to provide food and drink to impounded animals.

Section 188. Selling or offering to sell or exposing diseased animals.

Section 188-a. Selling disabled horse.

Section 189. Carrying animal in a cruel manner.

Section 190. Poisoning or attempting to poison animals.

Section 191. Throwing substance injurious to animals in public place.

Section 192. Keeping milch cows in unhealthy places and feeding them with food producing unwholesome milk.

Section 193. Transporting animals for more than twenty-eight consecutive hours without unloading.

Section 194. Running horses upon highways.

Section 196, is as follows:

"§196. To whom fines and penalties are to be paid. All fines, penalties or forfeitures imposed or collected for a violation of the provisions of this article, or of any act for the prevention of cruelty to animals, now in force or hereafter passed, must be paid on demand to the American Society for the prevention of cruelty to animals; except where the prosecution shall be instituted or conducted by a society for the prevention of cruelty to animals duly incorporated under the general laws of this state, in which case such fine, penalty or forfeiture must be paid on demand to such society. A constable or police officer must, and any agent or officer of any of said societies may, arrest and bring before a court or magistrate having jurisdiction, any person offending against any of the provisions of this

article. Any officer or agent of any of said societies may lawfully interfere to prevent the perpetration of any act of cruelty upon any animal in his presence. Any person who shall interfere with or obstruct any such officer or agent in the discharge of his duty shall be guilty of a misdemeanor. Any of said societies may prefer a complaint before any court, tribunal or magistrate having jurisdiction, for the violation of any law relating to or affecting animals and may aid in presenting the law and facts before such court, tribunal or magistrate in any proceeding taken. The officers and agents of all duly incorporated societies for the prevention of cruelty to animals or children are hereby declared to be peace officers within the provisions of section one hundred and fifty-four of the code of criminal procedure."

The compensation paid to the Society making a complaint or aiding the prosecution is as certainly appropriated to a public purpose as is the money paid to the District Attorney.

That the payment of public funds to a corporation for assisting in the enforcement of a penal law is an expenditure for a public purpose was recognized by the Court of Appeals in the case of *People ex rel. State Board of Charities vs. The New York Society for the Prevention of Cruelty to Children*, 161 N. Y., 233, where the Court said by O'BRIEN, J., at page 239:

"The defendant receives under the Charter of New York the sum of $30,000 annual-

ly from the City Treasury to promote the objects of its organization. But in receiving and disbursing that sum of money, it neither receives nor administers any charity, but is simply allowed something by the City for doing work that otherwise would devolve, as we shall see hereafter, on the Police Department, and which the Society can do better and with much less expense than the police * * * (p. 242). All the things that it does or can do would naturally and primarily devolve upon the Police Department, and the Society exists only because it can do the work of the Police more efficiently than they can * * * (p. 246). But obviously it (the $30,000) is not paid or received as a charitable contribution. The State in its political divisions expends large sums of money to prevent or punish crime, including the crime of cruelty to children. No one can very well claim that those moneys, expended in the enforcement of the criminal law, are paid for charity, and *yet that is the very purpose for which the city contributes this money to the defendant.*"

And by Judge GRAY at page 250:

"The statutory intent was to provide an independent and effective means of enforcing certain provisions of the criminal law and the intent is effectuated through the creation of a corporate body, whose sole undertaking is directed to that work * * * (p. 251). Its

corporate function is to prosecute offenders against those laws in the courts and the public moneys are paid to it to enable it to execute that corporate function."

The Society for the Prevention of Cruelty to Children has the same powers and duties with relation to the laws respecting children as the Society for the Prevention of Cruelty to Animals has with relation to the laws respecting animals. The Court decided that the former was "for every practical purpose a quasi-public corporation, authorized for the greater convenience and certainty of accomplishing that governmental work" (*i. e.*, the enforcement of the criminal law) (p. 256). That is exactly our claim for the Society for the Prevention of Cruelty to Animals.

In the legislative session of 1917, the American Society was commanded by the legislature to continue its work in the City of New York.

Laws 1917, chap. 900; §130, p. 2661:

> "Incorporated societies for the prevention of cruelty to animals, humane, or other like associations or corporations, now performing duties or exercising functions with reference to dogs in cities, under existing provisions of law or contracts entered into by them with the several cities of the state in which such duties or functions are performed or exercised, shall continue to perform such duties or exercise such functions in accordance with such provisions of law or the terms of such contracts. * * *"

POINT I.

This Court will not review the judgment of the New York Courts that the law in question does not offend against the Constitution of New York.

Slaughter House Cases, 83 U. S., 36;
Merchants &c., Bank vs. Pennsylvania, 167 U. S., 461;
Mich. Cent. R. Co. vs. Powers, 201 U. S., 245.

This excludes several questions argued by counsel for the plaintiff-in-error, for the judgment of the New York Courts it is submitted settles the law:

1. That the purposes of the American Society for the Prevention of Cruelty to Animals are public purposes.

2. That the license fees it collects are not devoted by the law to private purposes.

3. That the American Society for the Prevention of Cruelty to Animals is a subordinate public agency doing police work.

4. That the law does not deny plaintiff-in-error the equal protection of the laws.

In the *Fox* case (165 N. Y., 517) the Court held that a law under which a similar society in Albany operated and which was substantially identical

with the law here in question, as it then stood, was unconstitutional for two reasons which were stated by CULLEN, J., as follows (p. 526):

"But the defendant is not required to kill unlicensed dogs. It may dispose of them as it sees fit, and, therefore, retain them. It is empowered by the statute to apply the license moneys to maintaining a shelter for lost, strayed or homeless animals, which would include the very dogs seized for non-payment of the license. I cannot see why under this statute the defendant may not maintain a kennel of the largest description in which to retain dogs for its pleasure or from which to sell dogs for its profit. It seems to me idle to argue that such a work is governmental or that a corporation engaged in discharging it is *pro tanto* 'a subordinate governmental agency.' It is contended that the statute was enacted to exterminate homeless, wandering or diseased dogs, which may be a source of great danger to life and health. If the statute prescribed action appropriate to effect such result, the work directed to be done in pursuance of it might be well termed governmental and a very different question presented. The legislation before us we think destitute of any such feature. It is but an exaction of money or property from one citizen and its appropriation to another for its private use. Such is not a valid exercise of taxing power (Cooley on Taxation, 572; *Weismer vs. Village of Douglas*, 64 N. Y., 91; *Loan Association vs. Topeka*, 20 Wall.,

655). We are of opinion, therefore, that the statute, so far as it compels the owner of dogs to pay license fees to the defendant for the purposes prescribed in the statute, is an unauthorized appropriation of public moneys, and is in conflict with the Constitution.

We are of further opinion that the statute, so far as it empowers the defendant to appropriate, harbor and keep dogs without paying any license fee, while every other citizen is obliged to pay such license fee, is a grant of an exclusive privilege and immunity forbidden by Section 18, Article III of the Constitution. The law for the incorporation of societies of the character of this defendant permits the incorporation of but one society in a county. Therefore, the defendant is the only person, natural or artificial, who can keep dogs without paying a license. * * *

The defendant can keep any dog it sees fit, and is not required to pay anything for the privilege. No one else in the community can keep a dog without paying a dollar a year for the privilege, to say nothing of the fact that he is compelled to pay that dollar to the defendant. We think this an exclusive privilege condemned by the Constitution."

Judge CULLEN further wrote (*id*, p. 524):

"If the appropriation to the defendant of license fees prescribed by this statute is a gift of money to, or in aid of an association, corporation or private undertaking, then it is in

conflict with the constitutional provision cited. It is not necessary to determine whether these license fees are to be regarded as the money of the City or the money of the State. If money of the City, only permissive legislation empowering its appropriation is authorized by the Constitution; if it is the money of the State, it does not come within the exception to the Constitutional inhibition, to wit, 'Provision for the education and support of the blind, the deaf and dumb and juvenile delinquents.' It is ~~conceded~~, however, that the defendant, though a corporation organized by the voluntary acts of individuals, is a 'subordinate governmental agency,' and that an appropriation of money to its use is but an appropriation of money for the support of the government and not within the Constitutional restrictions. If it were necessary for the disposition of this case, agreeing with the view of the learned Appellate Division, I certainly should deny the right of the Legislature to vest in private associations or corporations authority and power affecting the life, liberty and property of a citizen, except that of eminent domain, to be exercised for a public purpose and the management and control of reformatory institutions to which persons may be committed by the judicial or other public authorities. There may be other exceptions, but they do not occur to me. Of course, the State or any of its subdivisions may employ individuals or corporations to do work or render service for it; but the distinction between a

public officer and a public employee or contractor is plain and well recognized (*People ex rel. Percival vs. Cram,* 164 N. Y., 167; Meechem on Public Officers, §2). I do not base my judgment exclusively on the view that a corporation cannot take an oath of office, for the acts of the corporation must be done by agents who are natural persons. In many cases the legislature has created corporations from boards of public officers. My chief objection is that the corporations are private in the sense that they proceed from the voluntary action of individual citizens alone (in many cases it is not necessary that the members of the corporation should be citizens), that the agents or officers of the corporation are appointed such by the corporators and that if such agents are invested by virtue of their agency alone with the power of public officers, it is in substance devolving the choice of public offices on a few of the citizens, and possibly persons not citizens, while under the Constitution all public officers must be elected or appointed by other public authorities and thus trace their title to power and authority either immediately or mediately back to the people (see *Ames vs. Port Huron, etc., Co.,* 11 Mich., 139; *State vs. Kennon,* 7 Ohio St., 537; *State ex rel. Clark vs. Stanley,* 66 N. C., 59). But if we assume that the legislature can create and has created this defendant 'a subordinate governmental agency' to assist in the enforcement of the criminal laws relative to cruelty to animals, still that

assumption will not establish the proposition that the devotion of these license fees is to a governmental purpose."

The law considered in the *Fox* case was Chapter 448 of the Laws of 1896. The judgment was pronounced in 1901. The legislature in 1902 amended the law to cure the defects. The Supreme Court of New York in the case at bar announced its decision as follows (Record, p. 1):

> "Judgment of the County Court of Kings County, affirming judgment of conviction of the Magistrate's Court, affirmed upon authority of People *ex rel.* Westbay vs. Delaney (146 App. Div., 957), affirming an order dismissing a writ of habeas corpus. The Court is also of opinion that the statute in question (Chapter 115, Laws of 1894, as amended by Chapter 412, Laws of 1895, and Chapter 495, Laws of 1902) is valid within decision in Fox vs. Mohawk & Hudson River Humane Society (165 N. Y., 517) and that it avoids the defects of the statute involved in that case as pointed out by the Court of Appeals.
>
> Jenks, P. J., Thomas, Mills and Rich, JJ., concur."

Judgment of the Appellate Division of the Supreme Court was affirmed by the Court of Appeals of New York (Record, p. 13). Under the practice in that State the remittitur went to the County Court of Kings County to which Court the writ of error was allowed (Record, p. 22).

The same question was presented in New York County. People *ex rel.* Westbay vs. Delaney, 73 Misc. Rep., 5. Mr. Justice Lehman upheld the law and wrote the only opinion, examining the questions at length. The Supreme Court, upon appeal, affirmed the judgment at Special Term upon the opinion of Mr. Justice Lehman (146 A. D., 957). The Supreme Court in this case affirmed the conviction of the plaintiff-in-error upon the authority of the *Westbay Case*. The affirmance in the Court of Appeals of the judgment in the case at bar is submitted to be virtually upon the judgment of Mr. Justice Lehman.

We then have in New York the law amended to cure the defects pointed out in the *Fox* case, and the American Society a subordinate public governmental agency (for such the Society must have been decided to be) collecting and disbursing for the public purposes of the state license fees with two penalties following disobedience of the law:

1. A possible seizure and destruction of the dog;

2. A prosecution for a misdemeanor.

The only federal question is submitted to be whether this law deprived the plaintiff-in-error of property in her two dogs.

POINT II.

No federal question is presented.

We do not understand that it is the contention of the plaintiff-in-error that the state may not, either directly or through a municipal corporation, regulate, by means of a license fee or otherwise, the keeping of dogs. Authorities holding this is within the police power are legion. The complaint of the plaintiff-in-error is not that there is an infirmity of legislative power in this respect. It is rather a quarrel with the policy of the legislature in conferring this power upon a *quasi*-public corporation. But this difference of opinion between the plaintiff-in-error and the legislature does not create a federal question. Whether the legislature exercises its police power directly or exercises it through a corporation especially created and endowed with public duties and responsibilities does not harm the plaintiff-in-error in a constitutional sense.

In the Court of Appeals, the highest court of the State, the plaintiff-in-error relied principally in support of his contention that the statute was unconstitutional, upon the decision in *Fox vs. Mohawk & H. R. Humane Society*, 163 N. Y., 517. Notwithstanding this, the same Court of Appeals affirmed the judgment against the plaintiff-in-error in the present case. In so doing the Court of Appeals must have held that the statute under which the defendant-in-error was operating fully

met its criticism of the statute involved in the *Fox* case. The *Fox* case, therefore, cannot be relied upon by the plaintiff-in-error here.

There is nothing in the Fourteenth Amendment which requires that the police power of the state be exercised in any particular way. It may and has, as in the present case, in its wisdom, clothed a *quasi*-public corporation, created especially for the purpose, with a part of its police power. That it can constitutionally do this is not open to question. As was said by Judge MILLER in Slaughter House cases, 16 Wall., 36, at 64:

> "If this statute had imposed on the City of New Orleans precisely the same duties, accompanied by the same privileges, which it has on the corporation which it created, it is believed that no question would have been raised as to its constitutionality. In that case the effect on the butchers in pursuit of their occupation and on the public would have been the same as it is now. Why cannot the legislature confer the same powers on another corporation, created for a lawful and useful public object, that it can on the municipal corporation already existing? That wherever a legislature has the right to accomplish a certain result, and that result is best attained by means of a corporation, it has the right to create such a corporation and to endow it with the powers necessary to effect the desired and lawful purpose, seems hardly to admit of debate. The proposition is ably discussed and affirmed in the case of *McCulloch vs. Mary-*

land, 4 Wheat., 316; in relation to the power of Congress to organize the Bank of the United States to aid in the fiscal operations of the government."

POINT III.

The statute does not deprive the plaintiff-in-error of any property in her dogs.

Sentell vs. N. O. & C. R. Co., 166 U. S., 698.

In that case a judgment reversing a recovery for a valuable dog negligently killed was affirmed on the ground that there is but a limited property in dogs.

Mr. Justice Brown shows in his opinion that such is the law as declared in Massachusetts, New Hampshire, Wisconsin, Indiana, Texas and Utah. Such also is the law of New York, for in the *Fox* case (165 N. Y., 517, opin., p. 520) Judge CULLEN wrote of the statute of 1896 of New York, then under examination:

> "The learned Appellate Division held this legislation void on two grounds: *First,* that the direction of the summary destruction or appropriation of the dog without notice to the owner was taking the property of such owner without due process of law. *Second,* that the act assumed to vest in the defendant, a private corporation, the execution of certain police powers of the State, and, in effect, to consti-

tute a public officer. We are of opinion that the decision below cannot be upheld on either of these grounds. Under any circumstances, there is but a qualified property in dogs, cats and similar animals, and, in fact, there may be said to be no property in them as against the police power of the State. In *Sentell vs. New Orleans & C. R. R. Co.* (166 U. S., 698) the Supreme Court of the United States upheld the constitutionality of a statute of the State of Louisiana which provided that no dog should be entitled to the protection of the law unless it should have been placed on the assessment rolls, and that the owner should not recover for injuries done to the dog in any civil action beyond the value fixed by him on the assessment roll, which statute was challenged as depriving the owner of property without due process of law in contravention of the 14th amendment of the Federal Constitution. In the opinion there delivered will be found a review of the common law on the subject of dogs and of the legislation of the various States and the decisions of the State Courts on the same subject. Such legislation and decisions are in substantial harmony."

Counsel for the plaintiff-in-error cites a case from Ohio (Brief, p. 15). The judgment in that case seems to be based upon the proposition that under the Constitution and laws of Ohio, property in dogs is as fully perfect and inviolate as in horses, oxen or sheep. That may be admitted to be true in Ohio, but it is not the law of New York where, as Judge

Cullen wrote, there is no property in dogs as against the police power of the State.

The theory of the license is stated in the opinion of Mr. Justice Brown in the *Sentell* case (166 U. S., 698):

> "As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and the worthless, such legislation as has been enacted on the subject though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats, and, regardless of statute, a ferocious dog is looked upon as *hostis humani generis*, and as having no right to his life which man is bound to respect."

It is, therefore, submitted that the property of the plaintiff-in-error in her dogs is so limited that she may be required by statute law to take out licenses and to pay license fees.

Scatell vs. N. O. & C. R. Co., 166 U. S., 698.

In that case this Court considered the State law and a city ordinance which forbade dogs not identified by collar and tag to run at large and directing the city treasurer to furnish tags at the rate of $2 each. The Trial Court charged the jury that the fact that the dog was not tagged as required by the city ordinance could not affect the right of the plaintiff to recover, and that the act of the legislature was in conflict with the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law. The jury found for plaintiff. The Court of Appeals reversed the judgment, holding that the plaintiff should have shown compliance with the law and the city ordinances. At the close of his opinion Mr. Justice Brown wrote:

> "Such legislation is clearly within the police power. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon * * *. In addition to this, dogs are required by the municipal ordinances of New Orleans to be provided with a tag, obtained from the treasurer, for which the owner pays a license tax of $2. While these regulations are more than ordinarily stringent, and might be declared to be unconstitutional, if applied to domestic animals generally, there is nothing in them of which the owner of a dog has any legal right to complain."